

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

**PBS COALS, INC.,**

**Plaintiff,**

**v.**

**CIVIL ACTION NO. 19-212**

**DAVID BERNHARDT,  
United States Secretary of the Interior,  
and**

**LANNY E. ERDOS,  
Acting Director,  
U.S. Department of the Interior,  
Office of Surface Mining Reclamation  
and Enforcement,**

**Defendants.**

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

For its Complaint against the Defendants David Bernhardt, United States Secretary of the Interior, and Lanny E. Erdos, Acting Director, U.S. Department of the Interior, Office of Surface Mining Reclamation and Enforcement (collectively, “OSM”), Plaintiff PBS Coals, Inc. (“PBS”) states as follows:

**INTRODUCTION AND SUMMARY OF ACTION.**

1. PBS brings this action to challenge OSM’s assessment and impending collection of “reclamation fees” from PBS under the federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201, et seq. (“SMCRA”), on the basis of PBS’ alleged “production” of “coal” in the form of coal refuse material that has no value.
2. PBS specifically seeks a declaration finding unlawful and enjoining OSM from seeking to collect such reclamation fees, interest and penalties from PBS based upon the findings

made in: (a) a “Revised Reclamation Fee Compliance Audit Report” dated November 13, 2019 (the “Revised OSM Audit Report”) and (b) a letter from OSM Audit Appeals Officer Alison Marco dated November 13, 2019 (the “November 13 Decision”).

3. As described below, the disposition of coal refuse at PBS operations between April 1, 2013 and December 31, 2015 (the “PBS Coal Refuse”) that is the subject of the Revised OSM Audit Report and the November 13 Decision wholly satisfied OSM’s policy for approval of a “No Value Determination” as set forth in OSM’s Coal Reclamation Fee Payer Handbook (October, 2011). Under that “No Value Determination” policy, coal refuse material removed from permitted coal refuse disposal areas under certain defined circumstances may be found to have “no value” and therefore is not subject to the reclamation fee imposed on coal production under SMCRA § 402, 30 U.S.C. § 1232.
4. OSM’s refusal to classify the PBS Coal Refuse as having “no value” under its “No Value Determination” policy was arbitrary, capricious, and an abuse of discretion within the meaning of the federal Administrative Procedure Act (“APA”), 5 U.S.C. § 551, et seq., including 5 U.S.C. § 706. In addition, the manner by which PBS was permitted to challenge OSM’s imposition of reclamation fee liability for the PBS Coal Refuse and OSM’s decision on that challenge were the result of an administrative review process that permits decisions that are arbitrary, capricious, and an abuse of discretion, and that is otherwise in violation of the procedures required by law. For all of these reasons, OSM’s decision to seek to collect reclamation fees from PBS based upon the Revised OSM Audit Report and the November 13 Decision must be held unlawful and set aside pursuant to 5 U.S.C. § 706.

### **PARTIES.**

5. Plaintiff PBS is a Delaware corporation with its principal place of business located at 1576 Stoystown Road, Friedens, PA 15541. PBS operates coal mines, including coal preparation plants and coal refuse disposal facilities, in Somerset County, Pennsylvania. It is a wholly-owned subsidiary of Corsa Coal Corporation.
6. Defendant David Bernhardt is the United States Secretary of the Interior. He is named in his official capacity.
7. Defendant Lanny E. Erdos is the Acting Director of the U.S. Department of the Interior's Office of Surface Mining Reclamation and Enforcement. He is named in his official capacity.

### **JURISDICTION AND VENUE.**

8. This Court has jurisdiction over this case pursuant to Article III, Section 2 of the United States Constitution; 28 U.S.C. § 1331 (federal question jurisdiction); 5 U.S.C. § 702 (Administrative Procedure Act ("APA"), legal wrong by federal agency action); 5 U.S.C. § 704 (APA, final agency action for which there is no other adequate remedy); 42 U.S.C. § 1983 (deprivation of Constitutional rights); and 28 U.S.C. § 2201 (declaratory relief).
9. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2) because the PBS coal refuse disposal areas at issue are located within this judicial district.

## **LEGAL BACKGROUND.**

### **AML Fee Assessment and Collection.**

10. SMCRA § 402 requires that coal mine operators pay a fee to OSM for “each ton of coal produced by surface coal mining.” 30 U.S.C. § 1232(a). Because these fees go into an Abandoned Mine Land (“AML”) fund, they are commonly referred to as “AML Fees.”
11. The current AML Fee rate for coal that has been surface mined is 28 cents per ton, unless the value of the coal is less than \$2.80 per ton (in which case the AML Fee is 10% of its value). 30 C.F.R. § 870.13(c). OSM regulations specify that “reclaimed coal” (recovered from a deposit that is not its original location, including coal recovered from refuse piles) is considered to be “surface mined” coal for purposes of this program. 30 C.F.R. § 870.5.
12. AML fees are due 30 days after the close of each calendar quarter for which the fee was owed. 30 C.F.R. § 870.21(a). Interest is assessed at the federal funds rate beginning with the 31<sup>st</sup> day following the close of each such quarter. In addition, a separate administrative penalty of 6% per year may be assessed on all AML fee payments that are more than 90 days past due. 30 C.F.R. § 870.21(b), (c). Finally, OSM may impose a “process and handling charge” on all delinquent amounts, depending upon whether such accounts are referred to a collection agency, handled internally, or referred to the U.S. Department of Interior’s Office of the Solicitor. 30 C.F.R. § 870.21(d).

### **OSM’s “No Value Determination” Policy.**

13. As noted, under OSM regulations any surface-mined coal (including recovered coal refuse) that has a value of less than \$2.80 per ton is assessed an AML fee equal to 10% of its value. 30 C.F.R. § 870.13(c). Therefore, if OSM determines that certain coal refuse has no value,

then any entity engaged in removing that material will not be required to pay an AML fee on it.

14. OSM’s Coal Reclamation Fee Payer Handbook (October, 2011) (“OSM Handbook”),<sup>1</sup> sets forth the criteria for obtaining a determination from OSM that “material removed from coal refuse piles” has “No Value for [AML] fee purposes.” OSM Handbook, p. 20. Those criteria are as follows:

- a. The material must be removed from a permitted coal refuse pile
- b. The material must be the waste by-product of a coal preparation process.
- c. The waste material must be used in a small power production or cogeneration facility licensed by the Federal Energy Regulatory Commission (“FERC”) to burn waste material.
- d. Except for use in the waste-fired production or cogeneration facility, there must be “no relevant market” for the material.
- e. The material must not be reprocessed using gravity separation techniques to remove residual coal from the refuse.

Id.<sup>2</sup>

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<sup>1</sup> OSM’s Payer Handbook may be accessed at <http://sscr.osmre.gov/OSM.aspx>.

<sup>2</sup> Recently, OSM released a “2019 No Value Policy Statement” (Nov. 1, 2019), which amends OSM’s 1994 “No Value Determination” policy as set forth in the OSM Handbook. Under this revised policy, any future requests for a determination of “no value” will be limited to coal refuse that was generated in connection with coal mined prior to August 3, 1977. This recently released policy does not purport to apply to No Value Determination requests submitted prior to November 1, 2019, and OSM has not asserted that PBS’ request for a No Value Determination (as described *infra*) was governed by this newly revised policy.

### **Factual Background.**

15. PBS restates the allegations set forth above.
16. Sometime prior to June 22, 2016, Mr. Richard Howie, PBS' Controller, asked Ms. Sheila Owens, the Acting Chief of OSM's Division of Compliance Management, about how PBS could seek a "No Value Determination" for the PBS Coal Refuse.
17. By letter dated June 22, 2016, Ms. Owens described to Mr. Howie how the PBS Coal Refuse could be classified as having "No Value for [AML] fee purposes." *See Exhibit A.* In that letter, Ms. Owens invited PBS to submit a statement explaining how the PBS Coal Refuse satisfies the "No Value Determination" criteria, along with copies of supporting documentation. According to that letter, a ruling in favor of PBS on such a request could be applied both prospectively and retroactively. *Id.* (penultimate sentence, last paragraph) (explaining that if refuse tonnage that had already been reported by PBS as "coal production" was found to have no value, OSM would permit PBS to request a refund of any AML fees that had been paid on such material).
18. Acting on Ms. Owens' letter, by letter of July 25, 2016, Mr. Howie sought a No Value Determination regarding coal preparation plant filter cake and coarse coal refuse material that was being removed from the refuse disposal area at the PBS "Shade Creek Complex" by a third party, Robindale Energy Services, Inc. ("Robindale"). *See Exhibit B.* As explained in that letter (and supported by the Refuse Removal Agreement that was enclosed with it), the removal of this material by Robindale and its subsequent use in a FERC-licensed cogeneration facility satisfied each of the five criteria in OSM's No Value Determination policy.

19. Without responding to Mr. Howie’s July 25, 2016 request, on March 9, 2017, OSM sent a Reclamation Fee Compliance Audit Report (the “Original OSM Audit Report”) to PBS. The Original OSM Audit Report concluded that PBS had failed to report and pay AML fees on approximately 1.6 million tons of “coal” production during the period from April 1, 2013 through December 31, 2015 – all in the form of coal refuse (including preparation plant filter cake material) that had been removed from the PBS Shade Creek Complex and from the PBS Cambria Fuel Complex.<sup>3</sup> The report, however, did not contain any findings of fact about the refuse removal operations at those facilities, and thus provided PBS with no explanation as to how or why OSM apparently disagreed with the statements made in Mr. Howie’s July 25, 2016 No Value Determination Request.
20. The Original OSM Audit Report stated that PBS could request an “administrative review” of any of its findings and results by submitting a written request within 30 days of receipt. Any such request was to include a description of the “specific reasons for the disagreement” and “written documentation to support each reason.”
21. On April 6, 2017, PBS timely filed a “Notice of Appeal/ Request for Review” of the Original OSM Audit Report with OSM’s Division of Compliance Management.
22. Shortly after submitting its Administrative Appeal, PBS received a letter from OSM dated March 30, 2017, denying Mr. Howie’s July 25, 2016 No Value Determination Request regarding refuse removed from the Shade Creek Complex. *See Exhibit C.* In that two-page letter, Mr. Michael Mills of OSM’s Division of Compliance Management asserted that OSM’s denial was based solely on PBS having failed to satisfy the “threshold criterion”

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<sup>3</sup> Based on the coal refuse tonnage and the period of time addressed, the Original OSM Audit Report implicitly denied Mr. Howie’s July 25, 2016 No Value Determination request as to the Shade Creek Complex refuse removal.

that the filter cake be removed from a “refuse pile,” as that term is defined by OSM regulation. In particular, Mr. Mills asserted that: (1) some portion of the filter cake was allegedly “not sent to the coal refuse disposal area”; and (2) some portion of the filter cake was allegedly “being removed from a pit below the surface elevation of a historic surface mine” and was therefore, “by definition...backfill [material].” Id.

23. After obtaining permission from OSM to do so, by letter dated July 5, 2017, PBS filed a more detailed explanation of the basis for its Administrative Appeal from the Original Audit Report. This supplemental filing included the Affidavit of Mr. Curtis Mears, the General Manager, Coal Preparation of PBS Northern Appalachian Division Preparation Plant Operations. *See Exhibit D* (July 5, 2017 letter and enclosures including Mears Affidavit). That Affidavit provided a detailed explanation of the refuse removal operations at the Shade Creek and Cambria Fuel complexes, and made reference to exhibits that were attached to it, including relevant agreements with third parties for refuse removal and documentation regarding the FERC certificates issued to the cogeneration facilities that ultimately received and burned the removed refuse. The Mears Affidavit also specifically refuted the two “findings” set forth in OSM’s March 30, 2017 letter that had denied the No Value Determination Request as to the Shade Creek refuse removal operations.

24. The PBS Appeal of the Original OSM Audit report languished before OSM’s Division of Compliance Management for more than thirty-one (31) months.

25. Finally, by the November 13 Decision, OSM Audit Appeals Officer Alison Marco informed PBS (by counsel) that its request for review of the Original Audit Report was



denied. *See Exhibit E.*<sup>4</sup> In that letter, OSM does not dispute that all of the PBS refuse removal operations satisfy the criteria for issuance of a “No Value Determination” under the applicable OSM policy statement. Instead, OSM denied the PBS Appeal solely because PBS did not obtain a ruling with respect to the classification of those refuse removal operations under that policy before they were initiated. *Id.*

26. OSM’s November 13, 2019 Decision fails to acknowledge or address OSM’s June 22, 2016 letter that informed PBS that a No Value Determination could be applied retroactively.

27. Upon information and belief, OSM intends to seek payment from PBS of all unpaid AML Fees as summarized in the Revised Audit Report (which fees total approximately \$133,000) and payment of all interest on such unpaid AML fees at the federal funds rate as specified by OSM regulation. OSM has not yet determined its position on assessment of an administrative penalty of 6% annual interest on those unpaid fees.

### **Count 1 –Procedural Due Process / Inadequate Administrative Review Process.**

28. PBS restates the allegations set forth above.

29. Whenever government agencies “adjudicate or make binding determinations” that directly affect a party’s legal rights, “it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process.” *Georator Corp. v. EEOC*, 592 F.2d 765, 768 (4<sup>th</sup> Cir. 1979) (citing *Hannah v. Larche*, 363 U.S. 420 (1960)); *Foster v. U.S. Env’tl. Prot. Agency*, No. 2:14-cv-16744 at \*17 (S.D. W. Va., Sept. 30, 2015). These procedures include a hearing before an impartial adjudicator, detailed notice of the matters

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<sup>4</sup> The Revised OSM Audit Report was provided with the November 13 Decision, and is attached as Exhibit F. Unlike the Original OSM Audit Report, the Revised OSM Audit Report does not state that it is subject to a right of administrative review.

to be determined, and the right to present and cross-examine witnesses. *Larche*, 363 U.S. at 446-447.

30. Prior to issuance of OSM’s November 13, 2019 Decision, PBS had no opportunity for a hearing, no notice of the specific matters being addressed by OSM, and no opportunity to present or cross-examine witnesses on the factual questions raised by its appeal.
31. OSM’s March 30, 2017 letter denying the PBS July 25, 2016 No Value Determination Request stated that OSM’s denial was based solely on PBS having failed to satisfy the “threshold criterion” that the coal refuse and filter cake be removed from a “refuse pile.” The November 13 Decision does not address this issue, or the unchallenged evidence submitted by PBS that refuted the findings in OSM’s March 30, 2017 letter on this issue.
32. OSM’s conduct in informing PBS that only one issue was involved in the appeal – and then completely failing to address the evidence regarding that issue in rendering its decision – is arbitrary and capricious, and plainly violates PBS’ Constitutional Due Process rights.
33. Because OSM’s administrative appeal procedures do not include any of the fundamental procedures “traditionally...associated with the judicial process,” they violate PBS’ procedural due process rights under the Fifth Amendment to the United States Constitution. *Larche*, 363 U.S. at 446-447.

## **Count 2 – Violation of the Administrative Procedure Act.**

34. PBS restates the allegations set forth above.
35. Having issued a “No Value Determination” policy for coal refuse material, OSM is required to administer that policy in a fair and reasonable manner, and may not issue

decisions under that policy that are arbitrary, capricious, or an abuse of discretion. 5 U.S.C. § 706.

36. As set forth in detail above, in addressing the PBS Administrative Appeal OSM completely ignored the uncontroverted factual evidence (that OSM invited PBS to submit) which demonstrated that the PBS refuse removal operations satisfied each of the requirements for issuance of a No Value Determination under the OSM policy. This constitutes arbitrary and capricious conduct under the APA, and is an unlawful abuse of discretion under the APA.
37. In the circumstances of this case, where PBS was specifically informed that a No Value Determination could be applied retroactively to its coal refuse removal operations, it was an abuse of discretion, arbitrary and capricious for OSM to deny the PBS appeal of the Original OSM Audit Report solely because PBS did not seek a decision in advance under the No Value Determination policy.

### **Count 3 – Violation of the Fair Notice Doctrine.**

38. PBS restates the allegations set forth above.
39. Due process requires that a party receive fair notice before being deprived of property, and before being subject to an action for enforcement of an administrative regulation. *United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4<sup>th</sup> Cir. 1997) (internal citations omitted); *Wisconsin Res. Prot. Council v. Flambeau Min. Co.*, 727 F.3d 700, 707-708 (7<sup>th</sup> Cir. 2013).

40. For the reasons described above, OSM's application of its AML Fee regulations and No Value Determination Policy to PBS violated the Fair Notice Doctrine and PBS' Constitutional Due Process rights.

WHEREFORE, for the reasons stated above, PBS Coals, Inc. requests an order granting the following relief:

- A. Staying the effectiveness of OSM's November 13, 2019 Decision and the Revised OSM Audit Report, and enjoining OSM and those acting in concert with OSM from enforcing either the November 13 Decision or the Revised OSM Audit Report, pending either:
  - i. the outcome of PBS' challenge to the November 13 Decision and the Revised OSM Audit Report, pursuant to OSM's reconsideration of the PBS appeal under procedures to be established by this Court that comport with fundamental Due Process; or
  - ii. this Court's consideration of PBS' challenge to the November 13 Decision and the Revised OSM Audit Report, and ruling on the merits of that challenge;
- B. Declaring that the November 13 Decision and Revised OSM Audit Report are arbitrary and capricious, an abuse of discretion, or otherwise contrary to law under the APA, including specifically 5 U.S.C. § 706, and setting aside and holding those decisions to be unlawful;
- C. Awarding PBS its attorney fees and costs associated with bringing this action pursuant to 42 U.S.C. § 1988 or other appropriate authority; and
- D. Awarding such further relief as the Court deems just.

Respectfully submitted,

PBS COALS, INC.

By Counsel

/s/ Kevin J. Garber

Kevin J. Garber (Pa. Bar No. 51189)

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(*Pro Hac Vice* To Be Submitted)

JS 44 (Rev. 09/19)

**CIVIL COVER SHEET**

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

**I. (a) PLAINTIFFS**

PBS Coals, Inc.

(b) County of Residence of First Listed Plaintiff Somerset  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Kevin J. Garber (Pa. Bar No. 51189) Babst Calland, P.C.  
Two Gateway Center, 6th Floor 603 Stanwix Street  
Pittsburgh PA 15222

**DEFENDANTS**

David Bernhardt, U.S. Secretary of the Interior  
Lanny E. Erdos, Acting Director, Office of Surface Mining

County of Residence of First Listed Defendant

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF  
THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question  
(U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity  
(Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	<input checked="" type="checkbox"/> 1	<input checked="" type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

**IV. NATURE OF SUIT** (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<b>PERSONAL INJURY</b> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit (15 USC 1681 or 1692) <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input checked="" type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	<b>PRISONER PETITIONS</b> <b>Habeas Corpus:</b> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <b>Other:</b> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

**V. ORIGIN** (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation - Transfer
- ☐ 8 Multidistrict Litigation - Direct File

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
5 U.S.C. 551, et seq. (Admin. Procedure Act); 30 U.S.C. 1201, et seq. (Surface Mining Act)

Brief description of cause:  
Appeal from OSM Decision Affirming Liability for AML Fees

**VII. REQUESTED IN COMPLAINT:**

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND:

☐ Yes ☒ No**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE

DOCKET NUMBER

DATE  
12/13/2019SIGNATURE OF ATTORNEY OF RECORD  
/s/ Kevin J. Garber

FOR OFFICE USE ONLY

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_

# EXHIBIT A





## United States Department of the Interior

### OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT Division of Compliance Management June 22, 2016



H. Richard Howie  
Corsa Coal Corp.  
125 Technology Drive, Suite 100  
Canonsburg, PA 15317

Dear Mr. Howie:

This is in response to your inquiry regarding the applicability of reclamation fees to a coal refuse operation.

Under the provisions of Federal regulations (30 CFR 870.5), reclamation fees apply to reclaimed coal. The regulations specifically define "reclaimed coal" as "coal recovered from a deposit that is not in its original geological location, such as refuse piles or culm banks or retaining dams and ponds that are or have been used during the mining or preparation process, and stream coal deposits. Reclaimed coal operations are considered to be surface coal mining operations for fee liability and calculation purposes". The standard fee, beginning October 1, 2012, is 28 cents per ton for surface mining operations, or 10 percent of the sales value of the coal when it results in a lower than standard rate (30 CFR 870.13).

However, OSM has a policy which provides, under very specific circumstances, that material removed from "refuse piles" can be considered to have No Value for reclamation fee purposes. In order to obtain a No Value determination, an operator must first make a request to the Division of Compliance Management and provide supporting documentation to prove the refuse meets all of the criteria. Any tons sold or transferred prior to receiving a No Value determination must be reported and fees will be assessed at the surface or ad valorem rate.

To be eligible for a No Value determination, the operator must submit information to document the material is from a permitted coal refuse pile. The regulations at 30 CFR 701.5 define a "refuse pile" as "a surface deposit of coal mine waste that does not impound water, slurry, or other liquid or semi-liquid material". **In addition to the threshold requirement that the material be removed from a "refuse pile", the material must meet, at a minimum, all four of the following criteria:**

1. The material was or is the waste by-product of a coal preparation process.
2. The waste material is used in a small power production or cogeneration facility qualified by the Federal Energy Regulatory Commission (FERC) to burn waste material. In order to grant certification, the Commission must find that the refuse material is a by-product and has little or no value.
3. Except for use in the waste-coal fired small power production or cogeneration facility certified by FERC, no relevant market exists for the waste material.
4. The material is not reprocessed utilizing gravity separation (wet washing) to remove the residual coal from the refuse.

These criteria represent the minimum standards that must be met, and other factors may be considered in reaching a final decision. In order to obtain a No Value determination, an operator must make a request to the



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June 22, 2016

Division of Compliance Management and provide supporting documentation to prove the refuse meets all of the criteria.

If you believe your operation(s) meets all four criteria, please submit a statement with your request citing the specific reasons this refuse should be determined to have No Value for reclamation fee purposes. Include the permit number, as well as documentation to support your request. Copies of supporting documentation for each permitted site should include:

- The permit number and the type of mining approved on the permit. Include documentation that the permit specifically includes an approved coal refuse area.
- Source of the coal refuse (e.g. whether it is the by-product of a previous or current coal preparation process and the name of the facility).
- A description of the refuse material. Include a specific statement whether the refuse is from a surface deposit that does not impound water, slurry, or other liquid or semi-liquid material.
- Any FERC decisions or self-certifications submitted to FERC regarding the facilities where you sold/transferred the refuse.
- Contracts or agreements between your company, or its affiliates, and the FERC certified facilities regarding the transfer of the refuse, including all details on sales price and transportation costs.
- Laboratory test results on the quality of the material transferred from your company to the FERC certified facilities.
- Any marketability studies regarding this material, and an express statement as to whether the material is saleable to any other customer other than a FERC facility certified to burn coal waste.
- Other statements should address the relationship between your company, or its affiliates, and the FERC certified facilities, specifically whether there is any common ownership; whether higher quality coal is mixed with the refuse for the plant fuel; and if the material is reprocessed utilizing gravity separation to remove the residual coal from the refuse.

All evidence in support of your request should be sent to me at [sowens@osmre.gov](mailto:sowens@osmre.gov). If you have any questions regarding this matter, please contact me at (606) 524-5703.

In the interim, it is important that you report these tons at the surface rate until a final decision is rendered on your request. If this tonnage is found to have no value for reclamation fee purposes, you may file an amended OSM-1 Form and request a refund. Failure to submit documentation to support your request will result in a denial.

Sincerely,



Sheila Owens, Acting Chief

# EXHIBIT B



Via e-mail

July 25, 2016

Sheila Owens  
Acting Chief  
Division of Compliance Management  
Office of Surface Mining Reclamation and Enforcement

Dear Ms. Owens

On behalf of PBS Coals, Inc. ("PBS") I am writing to request a No Value determination for waste material sent from the refuse area at our Shade Creek Preparation Plant. We note the following matters:

1. The permit numbers and approved mining are as follows:

Description	Permit Number	Permit Type
Shade Creek Plant	56841603	Surface Mining Permit
Job 12 Expansion	56900701	Coal Refuse Disposal Area

2. The waste material is a by-product of coal process utilized by the Shade Creek preparation plant and is removed from the refuse area (permit #56900701).
3. The material consists of ultra-fine particles which are high in ash, sulfur and moisture. The refuse area does not impound water, slurry or other liquid or semi-liquid material.
4. The waste material is used by Seward Generation Station ("Seward") located in New Florence, Pennsylvania for the production of power.
5. PBS transfers the waste material to Seward under a Refuse Removal Agreement with Robindale Energy Services, Inc. ("Robindale"). A copy of the contract between PBS and Robindale is attached. Under the terms of the agreement, PBS pays Robindale \$3,000 per month for the removal service which is offset by a Robindale payment for the use of roads, scales, utilities and other infrastructure. Therefore the waste material is not sold.
6. Sample laboratory results on the quality of the material transferred is attached.
7. PBS has not performed a market analysis.
8. There is no common ownership between PBS and Robindale.
9. The waste material is not reprocessed using gravity separation.
10. The waste material is not blended with higher quality coal.

PBS requests a No Value determination for the waste material described above.

Sincerely,

H. Richard Howie  
Controller  
PBS Coals, Inc.

**PBS COALS, INC.**  
1576 Stoystown Road  
P.O. Box 260  
Friedens, PA 15541  
Tel: 814-443-4668  
Website: [www.corsacoal.com](http://www.corsacoal.com)

## REFUSE REMOVAL AGREEMENT

This **REFUSE REMOVAL AGREEMENT** (the "Agreement") is made and entered into as of the ~~14<sup>th</sup>~~ day of May, 2014 (the "Effective Date"), by and between **PBS Coals, Inc.**, having offices located at 1576 Stoystown Road, Friedens, PA 15541 ("**PBS**"), and **Robindale Energy Services, Inc.** with its principal office located at 224 Grange Hall Road, PO Box 228, Armagh, PA 15920 ("**Robindale**"). Each of PBS and Robindale may sometimes be referred to individually as a "Party" and collectively as the "Parties."

**WHEREAS**, PBS operates multiple refuse disposal sites in Somerset County, Pennsylvania; and

**WHEREAS**, Robindale desires to enter into an agreement with PBS for removal, processing and disposal services at PBS's refuse sites.

**NOW, THEREFORE**, in consideration of the foregoing, for the mutual covenants and promises herein contained and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the Parties, and intending to be legally bound hereby, PBS and Robindale hereby agree as follow:

**1. Definitions** The following words and terms as used in this Agreement shall have the following meanings.

"**Business Day**" means any day on which the Federal Reserve member banks in New York, New York are open for business, including Saturday, but excluding Sunday or Holiday and a Business Day shall run from 6 a.m. to 11 p.m. Eastern Standard Time or Eastern Daylight Time, whichever is applicable, for the then current period in time.

"**Cambria Refuse Site**" means the refuse site located at PBS's Cambria Processing Plant located near Berlin, Pennsylvania.

"**Refuse Sites**" shall mean all refuse sites owned by PBS in Somerset County, Pennsylvania, including the Cambria Refuse Site and the Shade Refuse Site.

"**Refuse**" shall mean course refuse and filter cake produced as a byproduct at the processing plants and disposed at the refuse sites.

"**Shade Refuse Site**" shall mean the refuse site located at PBS's Shade Processing Plant located near Central City, Pennsylvania.

"**Term**" means the Primary Term and the Renewal Term, collectively

"**Ton**" means 2,000 pounds.

**2. Term and Termination.** This Agreement shall commence on January 1, 2014 and shall continue for an initial period ending on December 31, 2019 (the "Primary Term"). By written agreement, this Agreement may be extended for an additional five year term (the "Renewal Term"). Robindale shall provide PBS with advance written notice of its desire to renew this Agreement at least 90 days before termination of the Primary Term. At its discretion and assuming it is not in default, the non-terminating Party shall have up to one year from the termination date to ship any processed inventory and produce and load additional Refuse Material as may be useful to comply with third-party contracts existing prior to the termination date.

**3. Services.** Robindale shall provide to PBS the following services:

a) Refuse Services. Using its own labor and equipment, Robindale shall do the following:

- i. combine filter cake and coarse refuse at the Refuse Site to produce "Refuse Material"
- ii. load Refuse Material into trucks provided by Robindale
- iii. ~~remove Refuse Material from the Refuse Site~~
- iv. coordinate daily operations with PBS personnel
- v. maintain the Refuse Site, haul roads and ditches, as agreed upon by the Parties.

b) Quarterly Plan. Ten days prior to the beginning of each calendar quarter, Robindale shall provide a "Quarterly Plan" for approval by PBS. The Quarterly Plan shall include the following information for each Refuse Site:

- i. amount of Refuse to be removed
- ii. areas where new material will be placed
- iii. area to be used for drying of filter cake refuse

c) Volume:

- i. Monthly Minimum Average. During the Primary Term, Robindale shall remove from the Shade Refuse Site a minimum average of 30,000 Tons of Refuse ("Monthly Minimum Average").
- ii. Failure to Meet Monthly Minimum Average: If Robindale fails to remove the Monthly Minimum Average over a six month period ("Shortfall Period") Robindale shall pay PBS a "Shortfall Payment" which shall be the difference between the calculated monthly average and the Monthly Minimum Average for the Shortfall Period. If Robindale fails to remove the Monthly Minimum Average during two consecutive six month periods, PBS and Robindale shall meet to discuss corrective action, which may include termination of this Agreement. PBS acknowledges that the Robindale's removal rate may be affected by (i) weather conditions and (ii) availability of the Seward Plant. Shortfall Period calculations shall exclude the duration of any Force Majeure event.

**4. Shipping Report.** Within five days after the end of each Payment Period (defined below), Robindale shall submit a "Shipping Report" to PBS for the preceding Payment Period. Each Shipping Report shall include a detailed description of the number of Tons of Refuse Material shipped. All weight slips for the Payment Period shall be attached to each Shipping Report and all weights shall be determined by either certified scales at the Plant or at the destination facility.

**5. Fees**

a) Service Fee. Within ten days after the end of each Payment Period, PBS shall pay Robindale a "Service Fee" in the amount \$1,500 as full compensation for the Services provided at the Shade Refuse Site. By December 1 of each year, the Parties shall mutually agree upon the services fee for the following year.

b) Access Fee. As compensation for Robindale's ongoing use of PBS's roads, scales, utilities, and other infrastructure, Robindale shall pay PBS an "Access Fee" of \$1.10 for each Ton of Refuse Material removed from the Shade Refuse Site during the immediately preceding Payment Period. The Access Fee shall be paid within ten days after the end of each Payment Period. By December 1 of each year, the Parties shall mutually agree upon the access fee for the following year.

c) Fees for Other Sites. Service Fees and Access Fees for Refuse Sites other than Shade Refuse Site shall be agreed to in writing by the Parties as necessary.

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## **6. Payment.**

a) Each calendar month shall be divided into two payment periods ("Payment Period"). The first Payment Period shall be from the first day of the month through the fifteenth day of the month. The second Payment Period shall be from the sixteenth day of the month through the last day of the month.

b) Robindale shall pay all amounts due ten calendar days after the end of each Payment Period via wire transfer to the following account:

Bank Name	CITIBANK NEW YORK
ABA No.	021000089
Bank Account Name	PBS Coals, Inc.
Bank Account No.	30901563

7. Title; Risk of Loss. Title to the Refuse shall pass from PBS to Robindale at the time Refuse is loaded into Robindale's trucks.

8. Additional Opportunities. PBS and Robindale agree to work together to develop additional opportunities for the Refuse. If such opportunities arise, the Parties will amend this Agreement to include such opportunities.

9. Taxes. All taxes levied, assessed, or imposed upon the Refuse, whether assessed separately or not, shall be the responsibility of Robindale.

10. Force Majeure. PBS and Robindale shall each be relieved from performance under this Agreement to the extent that such performance is prevented by any cause or causes beyond their control including the following events of force majeure: acts of God, war (whether declared or undeclared), riots, revolution, insurrection, suspension of labor or measures adopted to counteract same, lockouts, fires, unforeseen geologic conditions, accidents, explosions, epidemics, floods, actions of any government (or agency thereof), interruption or suspension of deliveries, diversion, shutdown of the Seward Plant lasting longer than 10 days, and/or any other cause or causes whether of the kind and nature herein enumerated or otherwise which are beyond the control of Robindale or PBS. In the event that such a force majeure condition occurs, the Party directly affected shall promptly notify the other Party in writing.

11. Governing Law; Consent to Jurisdiction. This Agreement shall be governed by, and construed in accordance with, the laws of the Commonwealth of Pennsylvania. The Parties irrevocably and unconditionally consent and submit to the exclusive jurisdiction of the Court of Common Pleas of Somerset County, Pennsylvania, for litigation arising out of or relating to this Agreement and the transactions contemplated hereby, and further agree that service of process, summons, notice or document by U.S. registered mail to its respective address set

forth herein shall be effective service of process for any litigation brought against it in any such court. Each of the Parties hereby irrevocably and unconditionally waives any objection to the laying of venue of any litigation arising out of this Agreement and the transactions contemplated hereby in the Court of Common Pleas of Somerset County, Pennsylvania, and irrevocably and unconditionally waives and agrees not to plead or claim in such court that any such litigation brought in such court has been brought in an inconvenient forum.

**12. Default.** Each of the following events shall constitute an event of default under this Agreement.

a) A shall fail to pay or cause to be paid when due any amount which may be payable in accordance with the terms and conditions of this Agreement which is not in good faith disputed.

b) Any representation made by a Party in this document or in any document contemplated by this Agreement shall prove to be materially incorrect or to have omitted to state a material fact required to be stated therein or necessary to make it not misleading in light of the circumstances in which it was made.

c) A Party shall fail to perform any material covenant or obligation hereunder.

d) A Party shall file a petition in bankruptcy, have filed against it a petition in bankruptcy which is not dismissed or stayed within 90 days, or otherwise have a trustee, receiver or custodian appointed with respect to its assets or the conduct of its affairs, or the Party shall admit in writing that it is insolvent.

e) The performance by either of the Parties of its obligations hereunder shall materially conflict with the terms of any permit, license, law, order, rule, regulation, judgment or decision applicable to that Party.

**13. Rights and Remedies Upon an Event of Default.** Upon the occurrence of an event of default by a Party, the other Party may give written notice of such default to the defaulting Party, and if the defaulting Party does not cure such default within five days after receipt of such notice in the case of a default in payment, or 30 days after receipt of such notice in the case of a default other than a default in payment, then the other Party may:

- a) If the default is a default in payment, set off the amount due from the other Party against monies otherwise due to the other Party;
- b) Cure the same and either offset the costs of such cure against amounts otherwise due to the defaulting Party or be reimbursed by the defaulting Party for its reasonable costs incurred in effecting the cure;
- c) Suspend its actions that are required under this Agreement until the default is cured;
- d) Terminate the Agreement;
- e) If default is by PBS, Robindale shall be entitled to retain any prepayment or balance remaining of any prepayment made by PBS to Robindale under this Agreement.
- f) Take any other action or pursue any other right available at law or equity.



The remedies provided herein are cumulative and the exercise of one shall not limit, waive or preclude the exercise of other remedies in this section or otherwise in this contract or available at law or equity, at the same time or subsequently. Each of the Parties must mitigate their damages.

**14. Compliance with Laws Regulations and Orders.** Robindale shall comply with the provisions of all federal, state and other governmental laws and any applicable orders and regulations or any amendments or supplements thereto relating to the Services which have been or may at any time during the Term of this Agreement be issued by a governmental agency having appropriate jurisdiction. Robindale warrants that it and its subcontractors are now, and will remain, in compliance with all such laws, orders and regulations. Robindale shall promptly notify PBS when Robindale becomes aware of Law enacted after the Effective Date which in Robindale's commercially reasonable opinion would prohibit, make economically unfeasible, or restrict Robindale's ability to provide the Services. If, after making good faith efforts, Robindale is unable to obtain relief from the Law, Robindale may elect to terminate this Agreement.

**15. Employment Standards.** Robindale and Robindale's subcontractors, if any, shall comply with all applicable federal, state and local rules and regulations governing labor or employee relations, including Sections 6, 7, 12 and 14 of the Fair Labor Standards Act, as amended. Robindale agrees to be subject to all applicable contract clauses required by federal, state or local law, rule or regulation to be included in this Agreement, including but not limited to the following clauses, which are incorporated by reference herein: Equal Opportunity Clause (41 C.F.R. §60-1.4); Affirmative Action Clause for Disabled Veterans and Veterans of the Vietnam Era (41 C.F.R. §60-250.4); Affirmative Action Clause for Handicapped Workers (41 C.F.R. §60-741.4); the Certification of Non-segregated Facilities Clause (41 C.F.R. §60-1.8; 41 C.F.R. §1-12.803.10); and the Nondiscrimination Clause (16 Pa. Code §49.101). In addition, Robindale certifies, if applicable, that it has developed a written affirmative action compliance program [41 C.F.R. §60-1.40(a)] and annually files Standard Form 100 (EEO-1) [41 C.F.R. §60-1.7(a)].

**16. Non-Waiver.** The failure of any Party to insist in any one or more instances upon strict performance of any obligation of another Party under this Agreement shall not be deemed to be a waiver of the performance of any such obligation or a relinquishment of any rights hereunder for the future. Without limiting the foregoing, PBS's acceptance of any Coal that does not meet the Specifications shall not be deemed a waiver of any right PBS may have hereunder. The respective rights and remedies of the Parties are cumulative and not exclusive of any rights or remedies which any Party would otherwise have.

**17. Indemnification of PBS**

a) **Bodily Injury, Death, and Damage to Property.** Notwithstanding anything to the contrary in the other provisions of this Agreement, Robindale agrees to be responsible for, assume all liability for, and hereby agrees to release, defend, indemnify, and hold harmless PBS and its affiliates ("**PBS Companies**"), the PBS Companies' employees, agents, officers, directors, contractors and invitees, (collectively, the "**PBS Indemnitees**") against Claims arising in connection with: (i) bodily injury to and/or death of Robindale's employees, agents, contractors, subcontractors and invitees (collectively, the "**Robindale Parties**") or the PBS Indemnitees; and/or (ii) damage to or interference with use of property of the Robindale Parties or the PBS Indemnitees arising out of or resulting from (a) any Work and/or (b) arising out of or resulting from the Robindale Parties' actions or inactions at any time while on the PBS Premises. The indemnity obligations set forth in this sub-section 17(a) shall include any medical, compensation, or other benefits paid by any member of the PBS Indemnitees and shall apply even if the employee is determined to be the borrowed or statutory employee of any



member of the PBS Indemnitees.

b) Pollution and Hazardous Materials and Substances. Notwithstanding anything to the contrary in the other provisions of this Agreement, Robindale agrees to be responsible for and assume all liability for and hereby agrees to release, defend, indemnify and hold harmless PBS Indemnitees against Claims arising in connection with any harm or damage to any persons of any kind or damage to or interference with use of property arising out of or resulting from pollution or contamination (including but not limited to human exposure, personal injury, control, removal, restoration and cleanup of all pollution or contamination) which arises out of or resulting from (i) any Work and/or (ii) arising out of or resulting from the Robindale Parties' actions or inactions at any time while on any PBS Premises ("PBS Premises"), including but not limited to spills or leaks of fuel, lubricants, motor oils, pipe dope, paints, solvents, ballasts, bilge, garbage, sewerage. The indemnity obligations set forth in this sub-section 17(c) shall include but not be limited to any pre- or post-symptomatic medical monitoring, medical screening, medical damages, compensation, or other benefits paid by any member of PBS Indemnitees.

c) Liability to Third Parties. Subject to sub-sections 17(a)-(c), Robindale agrees to be responsible for and assume all liability for and hereby agrees to release, defend, indemnify and hold harmless PBS Indemnitees from and against Claims arising in connection with: (i) bodily injury to and/or death of third parties; and/or (ii) damage to or interference with use of property of third parties arising out of or resulting from (a) any Work and/or (b) arising out of or resulting from the Robindale Parties' actions or inactions at any time while on the PBS Premises.

d) Miscellaneous. The Parties agree to immediately notify each other of any accident, incident, event, or occurrence in which physical injury, property damage or pollution/contamination occurs and to complete an accident report for each occurrence and to provide each other with a copy of each such accident report. Each Party agrees to promptly notify the other Party within 30 days after receipt of any Claim for which PBS may seek indemnification. Robindale hereby agrees to furnish a legal defense under sub-sections (a) through (d) of this Section beginning at the earlier of (i) notice being given to the other Party of any accident, incident, event, or occurrence in which physical injury, property damage or pollution/contamination and (ii) receipt of any Claim by Robindale for which PBS may seek indemnification. In the event Robindale fails to furnish a defense and indemnity as provided for herein, PBS shall be entitled to receive from Robindale, in addition to its attorneys' fees, costs, expenses and any amounts paid in judgment or settlement, all costs, expenses, and attorneys' fees incurred in the enforcement of this Agreement. Furthermore, the prevailing Party in any litigation relating to this Agreement to enforce defense and indemnity, other than that involving defense and indemnity which is addressed above, shall be entitled to recover its reasonable and necessary attorneys' fees and costs of litigation from the other. **Robindale shall require any of its contractors or subcontractors to agree to identical indemnity provisions in favor of PBS Indemnitees as are set forth herein.** If any portion of this Section is deemed to be invalid or unenforceable for any reason whatsoever, then this Section shall be amended, construed and applied to afford PBS Indemnitees the broadest form of indemnity and defense allowable under any applicable law.

## **18. Insurance**

a) Robindale and any of its subcontractors retained to perform any portion of this Agreement shall maintain the insurance coverages set forth in Exhibit A, which is attached hereto and incorporated herein. Each of these required policies of insurance shall be written on an "occurrence" basis unless the policy is available only on a "claims made" basis, in which case such "claims made" insurance coverage shall be maintained in effect for a period of at

least five years after the Term. All insurance carried by Robindale in connection with this Agreement shall list PBS and its parents, affiliates and subsidiaries as an "Additional Insured," and such insurance will be primary and not contributory as to any other insurance carrier may have in effect. PBS does not express any opinion as to the sufficiency of the liability limits set forth in Exhibit A. The insurance required hereunder is not a limitation on any liability of Robindale.

b) PBS shall carry liability and casualty insurance in amounts, and with deductibles that are customary and reasonable for the industry, including adequate insurance to fully satisfy PBS' obligations under all state and federal workers compensation statutes including but not limited to obligations with respect to pneumoconiosis or "Black Lung".

### **19. Health and Safety**

a) Robindale shall take all necessary precautions for the safety and health of all Robindale Parties, and Robindale shall ensure that all Robindale Parties comply with all applicable provisions of federal, state, and municipal safety laws. Robindale is solely responsible and accountable to ensure that the Robindale Parties work safely, and Robindale's management must enforce safe work practices.

b) The Robindale Parties shall comply with all safety and health rules and regulations established by PBS for conduct on the PBS Premises, including, but not limited to, the safety and health rules outlined in PBS's employee Orientation Program. Any Robindale Parties found in violation of MSHA standards or any required site-specific rules or regulations are subject to removal from the PBS Premises. In addition, any Robindale Parties who willfully or repeatedly violate safety and health standards and practices shall be subject to dismissal from the PBS Premises. Unacceptable behavior and work practices that place employees, or fellow workers at risk of injury are forbidden, and all participants shall be subject to dismissal from the PBS Premises. PBS may notify Robindale of apparent safety and/or health violations, and Robindale shall take all necessary steps to correct such violations. However, PBS assumes no responsibility or liability with reference thereto.

c) Robindale shall ensure that the personnel of all Robindale Parties are given a safety and health orientation on safety rules and regulations established by PBS for conduct on the PBS Premises, prior to commencement of the Work. Robindale shall ensure that all Robindale Parties are aware of and understand the hazards to which they might be exposed and how to prevent harm to themselves and others.

d) Robindale shall ensure that all Robindale Parties adhere to all posted speed limits governing safe vehicle travel in and around the site. Robindale shall ensure that all vehicles which enter upon the PBS Premises are driven and occupied by properly trained individuals and maintained in safe operating condition with all necessary safety equipment, including, but not limited to, operational back-up alarms.

e) Personal safety and health equipment, e.g., hard hats, eye protection, and safety shoes, etc., necessary for proper protection of the Robindale Parties shall be the responsibility of Robindale. At no time will personal protective equipment be loaned, sold or given to the Robindale Parties by PBS.

f) The Robindale Parties shall immediately notify PBS of any reportable injury occurring on the PBS Premise.

### **20. Drug and Alcohol Abuse**

a) PBS is firmly committed to providing a safe workplace and to promoting high standards of employee health and safety. The objective is to establish and maintain a work environment that is free from the effects of alcohol and drug abuse. A work environment free from drugs and alcohol is especially important in the electric utility industry because of our basic responsibility to serve the public safely and without interruption.

b) Robindale shall be solely responsible for the Robindale Parties regarding drug and alcohol use. Controlled substances and alcohol are prohibited on the PBS Premises.

c) Any Robindale Parties who are used exclusively as truck drivers shall maintain a Commercial Driver's License and shall comply with DOT requirements.

**21. Arbitration.** All controversies or disputes regarding or involving this Agreement must be submitted to final and binding arbitration in accordance with the then applicable commercial arbitration rules of the American Arbitration Association ("AAA"). The final hearing shall be held in Somerset, Pennsylvania not more than 60 days after the initial demand for arbitration is filed. The arbitration panel shall consist of a total of three arbitrators who are knowledgeable about and experienced with the coal mining industry. The Party demanding arbitration shall appoint an arbitrator in its written demand for arbitration and shall identify the arbitrator's full name and address in such demand. The Party against whom arbitration is sought shall appoint an arbitrator within ten days of its receipt of the demand for arbitration by providing written notice to the Party demanding arbitration stating the full name and address of its designated arbitrator. The two party-appointed arbitrators shall appoint the third arbitrator within ten days of the appointment of the second arbitrator. This third arbitrator shall not be a neutral and disinterested person who has never been employed by nor had a direct business relationship with any of the Parties. If any Party fails, or the two party-appointed arbitrators fail, to name an arbitrator as provided above, the AAA shall appoint an arbitrator upon the request of either Party. A decision of the majority of the arbitrators shall be the decision of the arbitration panel and shall be final, valid and binding on the Parties hereto and shall be enforceable in any court of competent jurisdiction.

**22. Waiver of Right to Trial by Jury** EXCEPT AS PROHIBITED BY LAW, EACH PARTY HEREBY WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY A JURY IN RESPECT TO ANY LITIGATION DIRECTLY OR INDIRECTLY ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS LEASE OR ANY OTHER DOCUMENTS OR TRANSACTIONS RELATING THERETO.

**23. Confidentiality** The Parties agree that this Agreement contains sensitive, proprietary and confidential business information. Accordingly, the Parties agree not to disclose any of the terms or conditions of this Agreement to any person or entity. In the event that either Party ("~~Disclosing Party~~") is required by court order or otherwise is legally compelled to disclose any of the terms or conditions of this Agreement, the Disclosing Party shall provide the "~~Non-Disclosing Party~~" with prompt written notice thereof so that the Non-Disclosing Party may seek a protective order or other appropriate remedy. If such protective order or other remedy is not obtained, then the Disclosing Party shall furnish only those specific portions of the Agreement that the Disclosing Party is legally compelled to disclose. The Non-Disclosing Party has the express right to the remedies of specific performance and injunctive relief to enforce this Section.

**24. Notice.** All notices required to be given under this Agreement, unless otherwise specified, shall be made by confirmed by recognized overnight delivery service or by certified mail, postage prepaid, addressed,

if to PBS:  
PBS COALS, INC.  
PO BOX 260  
FRIEDENS, PA 15541  
Attention: President

With copies to:  
PBS COALS, INC.  
PO BOX 260  
FRIEDENS, PA 15541  
Attention: VP Legal Affairs

PBS COALS, INC.  
PO BOX 260  
FRIEDENS, PA 15541  
Attention: VP Domestic Sales & Logistics

if to Robindale:  
Robindale Energy Services, Inc.  
224 Grange Hall Road  
PO Box 228  
Armagh, PA 15920  
Attention: Jim Panaro

or to such other address as either Party from time to time may designate in writing to the other.

**25. Successors and Assigns.** This Agreement shall inure to the benefit of and shall be binding upon the Parties and their respective successors and assigns and shall remain in effect regardless of any PBS Change of Control (as defined below). For purposes of this Article XXVIII only, the term "PBS" shall mean PBS and its affiliates. Within five days after the consummation of a PBS Change of Control, PBS and the Acquiror shall each deliver to Robindale a written certification executed by duly authorized officers of PBS and Acquiror acknowledging that the Agreement shall remain binding and in full effect, and that PBS or Acquiror, as applicable, shall remain bound to fulfill all obligations of PBS under the Agreement. "PBS Change of Control" shall mean the following: (i) the sale, transfer conveyance or other disposition, directly or indirectly, in one or a series of related transactions, of all or substantially all of PBS's assets or a majority of its outstanding voting equity interests to a third party (an "Acquiror"), (ii) PBS's consolidation with or merger into an Acquiror, (iii) an Acquiror's consolidation with, or merger into PBS, or (iv) any transaction resulting in PBS's outstanding voting equity interests being either converted into or exchanged for cash, securities or other property, excluding any transaction resulting in PBS's voting equity interests (outstanding immediately prior to such transaction) being converted into or exchanged for the majority of the voting equity interests of an Acquiror.

**26. General Provisions.**

a) **Severability** If any part or provision of this Agreement is found by a court of competent jurisdiction to be invalid, illegal or otherwise unenforceable, that finding shall not invalidate or void the remainder of this Agreement; rather, the remaining provisions shall remain in full force and effect. The Parties further agree that the part or parts of this Agreement so held to be invalid, illegal or unenforceable shall be modified to the extent to make it enforceable, or, if necessary, shall be deemed to be amended to delete the unenforceable part or provision, and the remainder shall have the same force and effect as if such part or provision had never been included herein.

b) **Waiver.** Except as herein otherwise specifically provided and failure of either Party to insist on strict performance of any provisions of this Agreement or to take advantage of

any right hereunder, shall not be construed as a waiver of such provisions or right of subsequent performance thereof.

c) Survival of Terms. Notwithstanding the suspension or termination of this Agreement for any reason, the Parties shall continue to be bound by the provisions of this Agreement that reasonably require some action or forbearance after suspension or termination, including but not limited to those provisions related to indemnities, insurance, governing law/jurisdiction, disclaimer or damages, and/or ownership rights

d) ~~Remedies Cumulative~~. Remedies provided under this Agreement shall be cumulative and in addition to other remedies provided by law.

e) Disclaimer of Consequential Damages. PBS shall not be liable to Robindale for any indirect, incidental or consequential damages, including without limitation, overhead expenses or loss of anticipated profits or revenue, regardless of whether PBS has been informed of the possibility of such damages

f) Entire Agreement. This instrument contains the entire Agreement between the Parties in relation to the sale and purchase of Coal hereby agreed to be sold and purchased and supersedes all prior negotiations, memorandums and agreements, whether written or oral in relation to that Coal.

g) Independent Contractor. Robindale and PBS agree that in the performance of all services covered by this Agreement, Robindale shall be acting solely as an independent contractor.

h) Counterparts; Section Headings. This Agreement may be executed in two or more counterparts, each of which shall be an original, but such counterparts shall together constitute but one and the same instrument. The section headings are inserted for convenience only and are not to be construed as part of this Agreement.

The remainder of this page is intentionally blank.)  
(Signature page follows.)

**IN WITNESS WHEREOF**, the Parties have duly executed this Agreement, with all necessary right and authority to bind them, as of the Effective Date.

**PBS COALS, INC.**



By: \_\_\_\_\_  
D. Lynn Shanks, President

**ROBINDALE ENERGY SERVICES, INC.**



By: James F. Sanaro, E.V.P.

**EXHIBIT A**  
**INSURANCE REQUIREMENTS**

This contains a summary of PBS's insurance requirements. Robindale should submit this to its insurance agent or carrier so that Robindale can obtain the insurance coverage required by this Agreement.

SUMMARY OF REQUIREMENTS<sup>1</sup>

<b><u>TYPE OF COVERAGE</u></b>	<b><u>MINIMUM LIMITS</u></b>
<ul style="list-style-type: none"> <li><b>Workers' Compensation and Occupational Disease Disability</b></li> </ul>	As required by the laws of Pennsylvania.
<ul style="list-style-type: none"> <li><b>Employers' Liability</b></li> </ul>	\$1,000,000 each accident and Employees by Disease
<ul style="list-style-type: none"> <li><b>Comprehensive Auto Liability- Bodily Injury and Property Damage (including owned, hired, and non-owned)</b></li> </ul>	\$1,000,000 CSL each occurrence included
<ul style="list-style-type: none"> <li><b>Commercial General Liability and Property Damage Insurance</b> (including Premises/Operations, Protective, Products/Completed Operations, Broad Form Property Damage and Contractual Liability coverages)</li> </ul>	\$5,000,000 CSL each occurrence

<sup>1</sup> All insurers must have a minimum financial rating from the A.M. Best Company of B+ - VI.



**INSURANCE REQUIREMENTS (EXHIBIT A cont'd)**

Proof of the coverage set forth on the preceding page must be provided to PBS via a Certificate of Insurance. The Certificate of Insurance shall include the following conditions:

- The Certificate Holder shall be: PBS Coals, Inc., its parents, subsidiaries, affiliates and related companies.
- The Certificate shall contain a provision that the policy shall not lapse or be cancelled or materially changed without 30 days' prior written notice to the Certificate Holder.
- Indicate that the Certificate Holder, its parents, subsidiaries, affiliates and related companies has been included as an additional insured under the policies (excluding workers' compensation and employers' liability).
- Indicate in the comments section of the Certificate of Insurance that contractual liability coverage exists.
- The Certificate must identify states where coverage applies.
- Certificate must evidence that contractual liability coverage exists.
- The Certificate must be issued by the insurers and shall be signed by the authorized representative of the insurance company. Evidence of such authorization shall be furnished with the Certificate
- The coverage provided to the Certificate Holder is applicable to the negligence or other wrongdoing of the Certificate Holder, and is primary to and not contributory with any insurance maintained by the Certificate Holder.

You may address questions to:

Kim Russian  
Telephone: (814) 443-4668 (ext. 254)  
krussian@pbscoals.com



Robindale Energy Services,  
224 Grange Hall Road  
PO Box 228  
Armagh, PA 15920  
(814) 446-6700  
fax: 446-6605

Cardan Laboratories, Inc.  
Coal Sample Report

Red font = Lab Entries  
Blue Font = Sample Tag Information  
Gray Shaded = Calculated Values

SAMPLE ID INFORMATION									AS RECEIVED BASIS				
Lab#	Report Date	Sample Date	Mine Site	Sample ID	T.D.	T.D.	DEPTH		% H <sub>2</sub> O	ASH%	S %	FC %	BTI
174891	5-1-13	5-1-2013	SHADE	PIT					8.76	48.03	6.14	5982	
1133393	5-2-13	5-2-2013	SHADE						4.91	44.20	7.42	7174	
1133451	5-3-13	5-3-2013	SHADE						8.98	41.05	1.60	6906	
1133668	5-6-13	5-6-2013	SHADE						7.62	38.72	1.83	5735	
1133807	5-7-13	5-7-2013	SHADE						7.71	39.84	3.46	5526	
1133915	5-8-13	5-8-2013	SHADE						7.82	40.26	3.73	6139	
1134000	5-9-13	5-9-2013	SHADE						9.14	44.35	3.39	6617	
1134111	5-10-13	5-10-2013	SHADE						9.87	43.70	3.92	6415	
1134236	5-13-13	5-13-2013	SHADE						9.16	47.54	3.82	6035	
1134370	5-14-13	5-14-2013	SHADE						8.61	42.10	4.12	6368	
1134489	5-15-13	5-15-2013	SHADE						10.47	38.66	2.88	7211	
1134570	5-16-13	5-16-2013	SHADE						9.35	44.12	3.05	6678	
1134653	5-17-13	5-17-2013	SHADE						7.21	50.60	4.01	5717	
1134858	5-20-13	5-20-2013	SHADE						9.47	41.67	2.55	6926	
1134948	5-21-13	5-21-2013	SHADE						7.87	46.09	4.50	6372	
1135047	5-22-13	5-22-2013	SHADE						12.32	38.42	4.09	7231	
1135146	5-23-13	5-23-2013	SHADE						13.35	38.06	2.88	6956	
1135238	5-24-13	5-24-2013	SHADE						12.10	41.60	2.76	6755	
1135408	5-28-13	5-28-2013	shade						12.14	36.38	2.79	7401	
1135465	5-29-13	5-29-2013	SHADE						9.07	44.15	2.84	6312	
1135569	5-30-13	5-30-2013	SHADE						12.22	37.75	2.41	7336	
1135656	5-31-13	5-31-2013	SHADE						11.85	39.24	2.84	7184	
980336	5-1-14	5-1-2014	SHADE	PIT AS	LOADED				10.14	35.26	3.73	7855	
980337	5-1-14	5-1-2014	SHADE	WP AS	LOADED				13.25	49.10	2.86	5120	
980396	5-2-14	5-2-2014	SHADE	PIT AS	LOADED				6.74	39.98	5.24	7574	
980400	5-2-14	5-2-2014	SHADE	WP AS	LOADED				11.34	44.81	3.01	6179	
980555	5-15-14	5-15-2014	SHADE	NEW	SUMMER	PILE			12.37	30.99	2.68	8056	
980556	5-15-14	5-15-2014	SHADE	NEW	WINTER	PILE			18.16	27.15	1.78	7961	
1162534	5-12-14	5-12-2014	shade pit						7.45	45.48	5.28	6535	
1162579	5-13-14	5-13-2014	shade pit						6.47	45.65	4.00	6574	
1162780	5-15-14	5-15-2014	shade pit						5.22	48.90	4.10	6227	
1162808	5-16-14	5-16-2014	SHADE PIT						7.15	52.61	4.39	5347	
1163050	5-19-14	5-19-2014	SHADE PIT						5.48	52.90	4.43	5656	
1163268	5-21-14	5-21-2014	SHADE PIT						9.39	38.78	1.86	7339	
1163470	5-23-14	5-23-2014	SHADE PIT						7.16	51.86	3.68	5573	
1163645	5-27-14	5-27-2014	shade pit						4.74	50.46	6.34	6262	
1163745	5-28-14	5-28-2014	SHADE PIT						7.14	46.51	4.40	6300	
1163817	5-29-14	5-29-2014	SHADE PIT						8.56	47.12	3.42	5955	
1163963	5-30-14	5-30-2014	SHADE PIT						6.17	51.95	4.89	5617	
1162580	5-13-14	5-13-2014	shade wp						9.95	47.49	2.90	5934	
1162695	5-14-14	5-14-2014	shade wp						10.23	46.33	2.42	5733	
1162788	5-15-14	5-15-2014	shade wp						9.29	45.88	2.74	6141	
1162889	5-16-14	5-16-2014	SHADE WP						10.97	45.82	2.56	5730	
1163045	5-19-14	5-19-2014	SHADE WP						10.42	42.94	3.09	6679	
1163144	5-20-14	5-20-2014	SHADE WP						10.65	44.68	2.83	6307	
1163266	5-21-14	5-21-2014	SHADE WP						8.15	50.49	3.45	5480	
1163359	5-22-14	5-22-2014	SHADE WP						6.52	54.99	4.29	5042	
1163472	5-23-14	5-23-2014	SHADE WP						7.18	54.61	3.97	4849	
1163637	5-27-14	5-27-2014	shade wp						4.96	57.12	4.41	6069	
1163753	5-28-14	5-28-2014	SHADE WP						7.55	56.22	3.50	4628	
1195896	9-1-15	9-1-2015	SHADE PIT						10.35	42.29	2.20	6604	
1195957	9-2-15	9-2-2015	SHADE PIT						10.60	44.00	2.26	6357	
1196054	9-3-15	9-3-2015	SHADE PIT						11.08	46.50	2.18	5656	
1196145	9-4-15	9-4-2015	shade pit						11.22	40.53	2.27	6082	
1196257	9-8-15	9-8-2015	SHADE PIT						11.51	40.98	2.34	5787	
1196341	9-9-15	9-9-2015	SHADE PIT						8.17	48.99	3.70	6001	
1196424	9-10-15	9-10-2015	SHADE PIT						9.62	47.68	2.97	5894	
1196786	9-11-15	9-11-2015	SHADE PIT						10.32	46.68	2.98	6058	
1196786	9-11-15	9-11-2015	SHADE PIT						10.32	46.68	2.98	6058	
1197019	9-14-15	9-14-2015	SHADE PIT						9.99	48.09	2.61	5878	
1197123	9-15-15	9-15-2015	SHADE PIT						9.26	45.55	3.45	6211	
1197185	9-16-15	9-16-2015	SHADE PIT						5.57	56.31	3.89	4846	
1197264	9-17-15	9-17-2015	SHADE PIT						6.16	52.01	3.69	5716	
1197374	9-18-15	9-18-2015	SHADE PIT						5.77	58.46	2.70	4630	
1197374	9-18-15	9-18-2015	SHADE PIT						5.77	58.46	2.70	4630	
1197678	9-21-15	9-21-2015	SHADE PIT						5.23	55.62	4.07	5241	
1197761	9-22-15	9-22-2015	SHADE PIT						7.69	48.96	2.48	5939	
1197808	9-23-15	9-23-2015	SHADE PIT						7.48	49.54	3.48	5964	
1198856	9-25-15	9-25-2015	SHADE PIT						6.66	44.89	4.28	6932	

# EXHIBIT C



**United States Department of the Interior**  
**OFFICE OF SURFACE MINING**  
**RECLAMATION AND ENFORCEMENT**  
**Division of Compliance Management**  
March 30, 2017

PBS Coals, Inc.  
1576 Stoystown Road  
P.O. Box 260  
Friedens, PA 15541  
ATTN: H. Richard Howie, Controller

RE: PA Permit Number 56841603 (Shade Creek preparation Plant); and  
PA Permit Number 56900701 (Job 12 Expansion Refuse Disposal Area)

Dear Mr. Howie:

The Office of Surface Mining Reclamation and Enforcement has carefully reviewed your request for a determination of No Value for reclamation fee purposes for coal refuse removed from PA permits 56841603 and 56900701. Your request, and the information you provided in support of that request, was evaluated in accordance with the criteria set forth in OSM's policy "Reclamation Fee Determinations on Coal Refuse Piles," which was established in 1994. After careful review of the documentation, we have denied your No Value request on both permits. The reasons for the denial are explained below.

The intent of OSM's No Value policy is to provide guidance on the imposition of reclamation fees on coal removed from an abandoned coal refuse pile. The policy was created to ensure fair and consistent treatment of operators requesting a No Value determination. OSM evaluates each request individually. As a threshold matter, this policy requires that the material for which a No Value determination is sought must be "*material removed from coal refuse piles.*" The regulations (30 C.F.R. § 701.5) define a "refuse pile" as a "surface deposit of coal mine waste that does not impound water, slurry, or other liquid or semi-liquid material." If this threshold requirement is met, the policy further requires that, at a minimum, all of the following four criteria must be met:

1. The material was or is the waste by-product of a coal preparation process.
2. The waste material is used in a small power production or cogeneration facility qualified by the Federal Energy Regulatory Commission (FERC) to burn waste material. In order to grant certification, the Commission must find that the refuse material is a by-product and has little or no value.
3. Except for use in the waste-coal fired small power production or cogeneration facility, there exists no relevant market for the waste material. The facility would not exist but for the fact that the refuse material is waste material and governmental incentives have been created to utilize this type of disposal.

4. The classification of the material as waste with no value for AML fee purposes will not be affected by sorting or screening of refuse to separate usable waste from that which is not usable in the waste-coal facility. However, reprocessing utilizing gravity separation to remove the residual coal from the refuse will subject the product to AML fees even if the product is used in a licensed waste burner.

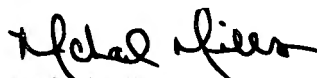
We have denied your request because the refuse material does not meet the threshold criterion, i.e. the material at issue has not been removed from coal “refuse piles.” After a visit to your operations, our specialists concluded that:

- The refuse material from PA 56841603 is fine coal refuse from the preparation plant which is fed into a thickener in slurry form. The final product identified as “cake” is the material that has been dewatered from the thickener. It is not sent to the coal refuse disposal area or placed in a refuse pile. Instead, it is shipped directly from the preparation plant to the power plant. Therefore, because this material is not removed from a refuse pile as defined by our regulations, it does not qualify as No Value under our policy.
- The refuse material from PA 56900701 is being removed from a pit below the surface elevation of a historic surface mine. The material by definition is backfill and is not being removed from a coal refuse pile. Therefore, this material does not qualify as No Value under our policy.

Should circumstances change, you may reapply and your compliance with all requirements will be evaluated at that time. Please be advised you must report all coal sold, transferred, or used from the above permits at the surface or *ad valorem* rate on Forms OSM-1. Section 402(d) of the Surface Mining Control and Reclamation Act provides that failure to report tonnage may be punished by a fine of not more than \$10,000 or by imprisonment for not more than one year, or both.

If you have any questions regarding this matter, please contact me at [mmills@osmre.gov](mailto:mmills@osmre.gov) or (859) 321-1236.

Sincerely,



Michael Mills  
Chief

# EXHIBIT D



Christopher B. Power  
Attorney at Law  
T 681.265.1362  
cpower@babstcalland.com

July 5, 2017

Via E-Mail Only (sowens@osmre.gov)  
Ms. Sheila Owens, Audit Appeals Officer  
Division of Compliance Management  
Office of Surface Mining Reclamation  
and Enforcement  
Williamsburg, KY

Re: PBS Coals, Inc.  
Report Number: 20160241067  
Report Issuance Date: March 9, 2017  
Reclamation Fee Compliance Audit Appeal  
Additional Information in Support of Appeal

Dear Ms. Owens:

I write on behalf of PBS Coals, Inc. ("PBS"), appellant in the referenced AML Audit Report appeal ("the Appeal"), to provide you with important information in support of PBS' pending appeal from the referenced March 9, 2017 Audit Report. In particular, I enclose the Affidavit of Mr. Curtis Mears, the General Manager, Coal Preparation of PBS Northern Appalachian Division Preparation Plant Operations. Mr. Mears' Affidavit, including its attachments, is offered in support of those parts of the appeal described below in which PBS is challenging the Office of Surface Mining Reclamation and Enforcement ("OSM")'s imposition of AML fee liability for alleged 'coal production' in the form of certain PBS coal preparation byproducts.

All of the challenged tonnage "production" that is addressed in this submission is itemized on Exhibit C of the Audit Report, covering the period from April 1, 2013 through December 31, 2015. As explained below, some of the alleged production is based on activities of Robindale Energy Services, Inc. at the PBS Shade Creek complex, and some of the alleged production is based on activities of Ridge Energy Company, Inc., at the PBS Cambria Fuel complex. For your convenience, a spreadsheet showing the total tonnages attributable to each is enclosed, which was prepared based on PBS internal accounting data.<sup>1</sup>

#### **1. Filter Cake and Refuse Removed from the Job 12 Expansion.**

The Audit Report lists the following as "unreported" coal production: (1) filter cake generated by PBS operations at its Shade Creek Preparation Plant (conducted under

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<sup>1</sup> As can be seen, the total tonnages from internal records for each time period closely match the totals shown in the Audit Report, with some immaterial differences. Should OSM require an affidavit attesting to the source of the information shown on this spreadsheet, please contact me and we will provide such a statement without delay.

Ms. Sheila Owens, Audit Appeals Officer  
 Office of Surface Mining Reclamation and Enforcement  
 July 5, 2017  
 Page 2

Pennsylvania Department of Environmental Protection (“PaDEP”) Mining Permit No. 56841603), that is disposed of at the nearby Job 12 Expansion refuse site (PaDEP Mining Permit No. 56900701); and (2) coal preparation refuse material from that same plant that is also regularly sent to the Job 12 Expansion refuse area

It is important to understand that the filter cake is transported by truck from the preparation plant to the refuse pile for disposal. After several months, the dried filter cake, as well as coarse refuse material from the preparation plant, is removed *from the coal refuse pile* by Robindale Energy Services, Inc. (“Robindale”), and transported to the FERC-certified Seward Cogeneration facility located near East Wheatfield Township, Pennsylvania, for use as fuel. *See* Mears Affidavit.

**A. April 1, 2013 through May 30, 2014.**

As verified by the Mears Affidavit, from the calendar quarter ending June 30, 2013 through May 30, 2014, the filter cake and refuse material removal was completed by Robindale under an arrangement whereby Robindale was paid a fee of \$1.00 / ton of combined filter cake and reject material, representing a fee paid for the service of removing these waste products from the Job 12 Expansion refuse area. We believe all of this material qualifies for a “No Value Determination” under the procedure and standards outlined in OSM’s Payer Handbook (October, 2011) (“the Handbook”), at pp. 20-21, and therefore should not be a part of unreported production identified in the Audit Report.<sup>2</sup>

In addition to the threshold requirement that the material be removed from a refuse pile, this operation satisfies each of the other requirements for a No-Value Determination established by the Handbook: (1) the material (both filter cake and coarse refuse) represents the waste byproduct of a coal preparation process; (2) the material was sold to a FERC-qualified small power generator or cogeneration facility and had little value; (3) except for use in such a qualified power facility, there was no market for this material; and (4) the material was not reprocessed through gravity separation to remove any residual coal from the refuse. *See* Mears Affidavit.

This amounts to a total of approximately 421,070.60 tons of production as set forth in the Audit Report that PBS does not believe should be subject to the AML fee, or \$ 32,520.09 in AML fees that should not be required to be paid, based on the valuations presented in Exhibit C of the Audit Report.

<sup>2</sup> We acknowledge that PBS did not file a request for a “no value” determination as to this filter cake and refuse material prior to submitting its AML fee statements for this particular time period. However, PBS had never been told and had no reason to suspect that OSM would view filter cake and coarse refuse material removed from its permitted refuse disposal area as “coal” subject to AML fee liability. We ask that, under the circumstances, OSM either evaluate the merits of PBS’ request for a “no value” determination as a part of this appeal, or permit PBS to file a separate request for a retroactive “no value” determination for such materials and defer ruling on this appeal until the outcome of that request.



Ms. Sheila Owens, Audit Appeals Officer  
 Office of Surface Mining Reclamation and Enforcement  
 July 5, 2017  
 Page 3

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## **B. June 1, 2014 through December 31, 2015.**

The filter cake and coarse refuse removed by Robindale beginning on June 1, 2014 through December 31, 2015 was governed by a May 14, 2014 "Refuse Removal Agreement" between PBS and Robindale (the "RRA"). Under the RRA, Robindale is paid a \$3,000/month (\$1500/pay period) removal service fee that is offset by a payment to PBS of \$1.10/ ton for Robindale's use of roads, scales, utilities and other PBS infrastructure.

The material removed during this period was the subject of "No Value Determination Request" filed by PBS on July 25, 2016 (the "NVD Request"), that included a copy of the RRA. The NVD Request was filed by PBS pursuant to the procedure and standards outlined in the Handbook.<sup>3</sup>

In OSM's March 30, 2017 letter denying the NVD Request, OSM stated that its denial was based solely on PBS having failed to satisfy the "threshold criterion" that the filter cake be removed from a "refuse pile," as that term is defined by OSM regulation. That conclusion, in turn, was based on two (2) findings: (1) that some portion of the filter cake was allegedly "not sent to the coal refuse disposal area"; and (2) that some portion of the filter cake was allegedly "being removed from a pit below the surface elevation of a historic surface mine" and was therefore, "by definition...backfill [material] that is not being removed from a coal refuse pile." Although we have not been made aware of the specific source of these findings, the enclosed Affidavit of Mr. Curtis Mears (a person with first-hand knowledge of such matters) serves to correct the record as to this erroneous information.

This amounts to a total of approximately 725,055.94 tons of production as set forth in the Audit Report that PBS does not believe should be subject to the AML fee, or \$ 58,528.87 in AML fees that should not be required to be paid, based on the valuations presented in Exhibit C of the Audit Report.

## **2. Filter Cake and Refuse Removed from the Job 10 Refuse Site.**

A very similar arrangement exists at the PCB Cambria Fuel complex. There, filter cake generated by the preparation plant is transported by Ridge Energy Company, Inc. ("Ridge Energy") to the PBS "Job 10 Refuse" disposal area (PaDEP Mining Permit No. 56910701), and later removed for transportation to a FERC-qualified cogeneration facility. *See* Mears Affidavit. Ridge Energy does not receive any payment from PBS for this service, but pays PBS a nominal fee of \$0.50/ton for use of its facility in connection with Ridge Energy's removal operations. *Id.* This filter cake removal arrangement has been in place at the Cambria Fuel complex since April 1, 2013.

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<sup>3</sup> For your convenience, copies of the July 25, 2016 NVD Request and OSM's March 30, 2017 letter denying that Request are enclosed.



Ms. Sheila Owens, Audit Appeals Officer  
Office of Surface Mining Reclamation and Enforcement  
July 5, 2017  
Page 4

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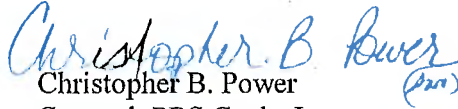
Again, we believe this removal of filter cake and coarse refuse from a designated refuse pile satisfies each of the requirements for a No-Value Determination established by the Handbook. This amounts to a total of approximately 497,968.86 tons of production as set forth in the Audit Report that PBS does not believe should be subject to the AML fee, or \$38,265.02 in AML fees that should not be required to be paid, based on the valuations presented in Exhibit C of the Audit Report.

\* \* \*

In conclusion, on the basis of the matters raised in the Notice of Appeal and the additional information provided by with this letter, we respectfully request that Division find and determine that all of the tonnage production shown on Exhibit C of the Audit Report, covering alleged coal production from the calendar quarter ending June 30, 2013 through December 31, 2015, should not be and will not be subject to an AML fee.

Please contact me should there be any questions regarding this filing. Thank you very much for your time and attention to this matter.

Sincerely,

  
Christopher B. Power  
Counsel, PBS Coals, Inc.

encl.

CBP/mot

cc: Daniel Boncacci, Corsa Coal Corp./ PBS Coals, Inc.

**BEFORE THE U.S. DEPARTMENT OF THE INTERIOR  
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT  
Division of Compliance Management**

**In Re: PBS Coals, Inc.  
Reclamation Fee Compliance Audit Appeal  
Report Number: 20160241067  
Report Issuance Date: March 9, 2017**

**AFFIDAVIT IN SUPPORT OF APPEAL**

Curtis Mears, being first duly sworn, deposes and says:

1. I am the General Manager of Coal Preparation for PBS Coals, Inc. ("PBS"), the appellant in the AML Fee Audit Report Appeal referenced above. In this position, I have managed the operations at the Shade Creek Preparation Plant (conducted under Pennsylvania Department of Environmental Protection ("PaDEP") Mining Permit No. 56841603), Job 12 Expansion (PaDEP Mining Permit No. 56900701), the Cambria Fuel Coal Preparation Plant (PaDEP Mining Permit No. 56841608), and the "Job No. 10 Refuse" Coal Refuse Disposal Area ((PaDEP Mining Permit No. 56910701).
2. As a result of my work overseeing the facilities identified in paragraph 1, I am also familiar with the history and details surrounding the removal of filter cake and coarse coal refuse from the Shade Creek complex by Robindale Energy Services, Inc. ("Robindale") and the removal of filter cake and coarse coal refuse from the Cambria Fuel complex by Ridge Energy Company, Inc. ("Ridge Energy"). To the extent that any statements made herein are not based upon my personal knowledge because they relate to time periods that preceded my employment with PBS, those statements are based upon information provided to me by other PBS employees and/or employees of Robindale Energy Services, Inc. and Ridge Energy Company, Inc., with responsibility and knowledge of such matters, and to the best of my information and belief, are true, accurate and complete.

Shade Creek Complex/ Robindale Energy Services, Inc.

3. At the Shade Creek complex, filter cake is generated at the preparation plant and transported by truck from the plant to the refuse pile. As explained below, the filter cake is later removed by Robindale. At the same time, Robindale removes coarse coal refuse from the refuse pile. It is my understanding from discussions with people with knowledge that Robindale transports both the filter cake and the refuse material to the Seward Cogeneration facility located near East Wheatfield Township, Pennsylvania, where it is purchased for use as fuel. It is further my understanding that the Seward Cogeneration Plant has been certified by the Federal Energy Regulatory Commission (FERC) as qualified to burn waste coal as fuel. (Attached as Exhibit A to this Affidavit is information showing that the Seward plant is FERC-certified.)
4. An accurate, general diagram of the Shade Creek Complex is attached to this Affidavit as Exhibit B. The coal preparation plant where the filter cake and coarse coal refuse are generated, and the coal refuse disposal area where they are disposed of (and from which they are removed by Robindale), are both shown on Exhibit B.
5. Since at least April 1, 2013, the filter cake generated by the Shade Creek Preparation Plant has always been taken to the refuse pile depicted on Exhibit B. To the extent that the filter cake has been or is removed by Robindale, it is removed from the refuse pile.
6. Since at least April 1, 2013, the filter cake generated by the Shade Creek Preparation Plant has never been used to reclaim any areas at any surface mine. In addition, to the best of my knowledge and information, PBS does not hold a mining permit that would allow filter cake

or any other type of coal refuse or waste material to be used in backfilling or reclaiming any areas at a surface mine.

7. Since at least April 1, 2013, none of the filter cake generated at the Shade Creek plant has been subject to further processing by PBS by gravity separation (or otherwise) to remove residual coal from the refuse or waste material.
8. From April 1, 2013 through May 30, 2014, Robindale was paid a fee of \$1.00 / ton of combined filter cake and refuse material for the service of removing these waste products from the Shade Creek Refuse Disposal Area.
9. From June 1, 2014 through December 31, 2015, Robindale's removal of the filter cake and coarse coal refuse material was undertaken pursuant to a May 14, 2014 "Refuse Removal Agreement," under which Robindale is paid a \$3,000/month (\$1500/pay period) removal service fee that is offset by a payment to PBS of \$1.10/ ton for Robindale's use of roads, scales, utilities and other PBS infrastructure.


Cambria Fuel Complex/ Ridge Energy Company, Inc.

10. At the Cambria Fuel complex, filter cake generated by the preparation process is deposited at the PBS "Job 10 Refuse" refuse disposal area (PaDEP Mining Permit No. 56910701), and later removed by Ridge Energy Company, Inc. ("Ridge Energy") for transportation to the Cambria generating station, a FERC-qualified cogeneration. (Attached as Exhibit C to this Affidavit is information showing that the Cambria plant is FERC-certified.) Ridge Energy does not receive any payment from PBS for this service, but pays PBS a nominal fee of \$.50/ton for use of its facilities in removing the filter cake. Copies of the draft Master Service

Agreement and Purchase Order, which govern Ridge Energy's operations, are collectively attached to this Affidavit as Exhibit D.

11. Since at least April 1, 2013, none of the filter cake generated at the Cambria Fuel plant has been subject to further processing by PBS by gravity separation (or otherwise) to remove residual coal from the refuse or waste material.

12. And further the affiant sayeth naught.

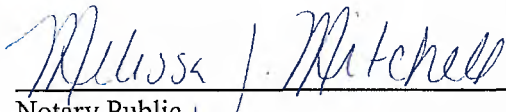
  
Curtis Mears  
General Manager, Coal Preparation  
PBS Coals, Inc.

STATE OF Pennsylvania,

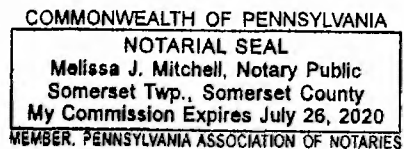
COUNTY OF Somerset, to-wit:

Taken, subscribed and sworn to before me this 5<sup>th</sup> day of July, 2017.

My commission expires 7/26/2020.

  
Notary Public

[NOTARIAL SEAL]



# Exhibit A

154 FERC ¶ 61,017  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, Tony Clark,  
and Colette D. Honorable.

Reliant Energy Seward, LLC  
NRG Wholesale Generation LP

Docket Nos. ER04-1164-001

NRG Wholesale Generation LP  
Seward Generation, LLC

ER16-413-000

NRG Wholesale Generation LP  
Seward Generation, LLC

EL16-28-000  
(Not Consolidated)

ORDER ACCEPTING INFORMATIONAL FILING, GRANTING WAIVER,  
INSTITUTING SECTION 206 PROCEEDING, AND ESTABLISHING HEARING  
AND SETTLEMENT JUDGE PROCEDURES

(Issued January 14, 2016)

1. On November 25, 2015, in Docket No. ER04-1164-001, NRG Wholesale Generation LP (NRG) submitted an informational filing pursuant to Schedule 2 to the PJM Interconnection, L.L.C. (PJM) Open Access Transmission Tariff (OATT), regarding the reactive power rates for the Seward Generating Facility (Facility), the planned sale of that facility from NRG to Seward Generation LLC (Seward), and the transfer of the Facility's revenue requirement for reactive supply and voltage control service as part of the transaction (Informational Filing). On December 8, 2015, in Docket No. ER16-413-000, NRG and Seward submitted a request for a one-time waiver of the 90-day prior notice requirement set forth in Schedule 2 of the PJM OATT to facilitate the planned sale of the Facility (Waiver Request). In this order, we accept the Informational Filing and grant the Waiver Request.<sup>1</sup> We also institute a proceeding pursuant to section 206 of the

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<sup>1</sup> We take this opportunity to clarify the Commission filing requirements for utilities making informational filings under Schedule 2. Utilities that have established an eTariff for reactive power should make their informational filing using eTariff Type of Filing Code 80 (Compliance Filing) using the same filing number used for the reactive power tariff. This will assure that the filing receives a subdocket related to the original reactive power tariff filing. Companies whose reactive power tariffs are not yet in eTariff also should make their informational filing using eTariff Type of Filing Code 80

(continued...)



Docket No. ER04-1164-001, *et al.*

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Federal Power Act (FPA),<sup>2</sup> regarding the continued justness and reasonableness of NRG's reactive power rates.<sup>3</sup>

# **I. Informational Filing and Waiver Request**

2. Schedule 2 of the PJM Tariff, which covers Reactive Service, provides that PJM will compensate owners of generation and non-generation resources for maintaining the capability to provide reactive power to PJM. Specifically, Schedule 2 states that, for each month of Reactive Service provided by generation and non-generation resources in the PJM region, PJM shall pay each resource owner an amount equal to the resource owner's monthly revenue requirement, as accepted or approved by the Commission.<sup>4</sup> Schedule 2 requires that at least 90 days before deactivating or transferring a resource receiving compensation for reactive supply and voltage support, the resource owner either: (1) submit a filing to either terminate or adjust its cost-based rate schedule to account for the deactivated or transferred unit; or (2) submit an informational filing explaining the basis for the decision by the Reactive Power Supplier not to terminate or revise its cost-based rate schedule.

3. On November 25, 2015, NRG submitted the Informational Filing pursuant to Schedule 2. In the Informational Filing, NRG states no revisions to the Reactive Power Tariff are being proposed, because the revenue requirement set forth therein was established solely for the Seward Generating Station and the entirety of that facility and the Reactive Power Tariff are being transferred to Seward.<sup>5</sup> NRG states that following the consummation of the sale, the Facility will continue to provide reactive supply and

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(Compliance Filing), without a referenced filing number, and with a tariff record for their current reactive power rate schedule. In addition, we encourage companies with reactive power rate schedules who are currently in the M (market based rate) program in company registration to change their program registration to the E (traditional cost of service).

<sup>2</sup> 16 U.S.C. § 824e (2012).

<sup>3</sup> We note that throughout this order, reference to NRG's reactive power rates is exclusive to Reliant Energy Seward LLC's Reactive Power Tariff acquired by NRG, as established in Docket No. ER04-1164-000.

<sup>4</sup> PJM, Intra-PJM Tariffs, OATT, Schedule 2 (3.1.0).

<sup>5</sup> NRG and Seward filed a request to transfer jurisdictional facilities pursuant to section 203 of the Federal Power Act on December 1, 2015 in Docket No. EC16-45-000, which is pending Commission consideration.

voltage control service to PJM on the same basis.<sup>6</sup> NRG and Seward state that in connection with the transaction, NRG and Seward will be seeking various regulatory approvals and third-party consents. Other than the expiration of the 90-day notice period that is the subject of this waiver request, all of these approvals and consents are expected to be obtained by mid- to late January 2016.

4. In the Waiver Request, NRG and Seward seek a one-time waiver of the 90-day prior notice requirement which requires NRG to have submitted the Informational Filing 90 days prior to the planned transfer of the Facility. NRG and Seward state that NRG currently receives compensation for reactive supply and voltage control service from the Facility. NRG and Seward request the Commission issue an order granting the waiver, with immediate, prospective effect, on or before January 15, 2016.<sup>7</sup>

5. NRG and Seward state that good cause exists to grant the 90-day prior notice requirement. NRG and Seward state that granting the waiver will facilitate the transfer of the Facility to Seward and allow the parties to consummate the sale as soon as possible after other regulatory approvals and third-party consents have been obtained, rather than waiting until February 23, 2016.<sup>8</sup> NRG and Seward state that in past cases the Commission has granted tariff waivers under similar circumstances where the: (1) movants have acted in good faith; (2) the waiver is of limited scope; (3) the waiver would address a concrete problem; and (4) the waiver does not have undesirable consequences, such as harming third parties.<sup>9</sup>

6. NRG and Seward state that they have acted in good faith by submitting the Informational Filing on November 25, 2015, just one day after executing the Asset Purchase Agreement on November 24, 2015. NRG states that it has maximized the prior notice to the Commission and to the public of the transfer of the Facility that is receiving reactive power compensation. NRG and Seward state the waiver is limited in scope, and that NRG and Seward are only requesting a one-time waiver of the deadline under Schedule 2. NRG states that the requested waiver is necessary to address the concrete problem that, absent a waiver, NRG and Seward will not be able to consummate the Transaction until 90 days after the submittal of the informational filing. NRG states they

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<sup>6</sup> NRG, Informational Filing, Docket No. ER04-1164-001 at 4.

<sup>7</sup> NRG and Seward, Joint Request for Waiver, Docket No. ER16-413-000, at 1 (filed November 25, 2015) (Waiver Request).

<sup>8</sup> *Id.* at 7.

<sup>9</sup> *Id.* at 7 (citations omitted).

Docket No. ER04-1164-001, *et al.*

- 4 -

are not requesting waiver of any substantive requirements under Schedule 2, and that granting the waiver will have no undesirable consequences or harm on third parties.<sup>10</sup>

7. NRG states that the Reactive Power Tariff for the Facility was originally filed by Reliant Energy Seward, LLC in Docket No. ER04-1164-000 and was accepted by a delegated letter order issued in that proceeding on October 18, 2004. NRG states that NRG (then known as Reliant Energy Wholesale Generation, LLC) acquired, and succeeded to, the Reactive Power Tariff when Reliant Seward was merged with, and into, NRG Wholesale on December 1, 2008.<sup>11</sup> NRG states that the Facility is a 525 MW waste coal facility that has an actual megavolt-ampere reactive (MVAR) capability of 248 MVARs at the generator terminals, while the nameplate rating is 257 MVARs.<sup>12</sup>

## **II. Notice and Responsive Pleadings**

8. Notice of NRG's Informational Filing was published in the *Federal Register*, 80 Fed. Reg. 76,679 (2015) with interventions and protests due on or before December 16, 2015. No interventions or protests were filed.

9. Notice of NRG and Seward's Waiver Request was published in the *Federal Register*, 80 Fed. Reg. 75,676 (2015), with interventions and protests due on or before December 16, 2015. PJM submitted a timely motion to intervene.

## **III. Discussion**

### **A. Procedural Matters**

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), PJM's timely, unopposed motion to intervene serves to make it a party to this proceeding.

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<sup>10</sup> *Id.* at 7-8.

<sup>11</sup> Informational Filing at 3 (filed November 25, 2015) (Informational Filing). Under Order No. 714, when existing tariffs or agreements need to be modified to reflect changes in names or ownership, the utility is required at the time of the transaction to make a baseline filing to include the tariff or agreement in eTariff. *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276, at P 93 (2008). NRG, therefore, should have filed its reactive power tariff in eTariff when it acquired the Facility in 2008.

<sup>12</sup> Informational Filing at 4-5. NRG states that the Facility's actual megavolt-ampere (MVA) capability is 583 MVA, while the nameplate rating is 591 MVAs.

Docket No. ER04-1164-001, *et al.*

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## **B. Substantive Matters**

11. We accept NRG's Informational Filing for informational purposes only. We also find good cause exists to grant NRG and Seward's request for waiver of the 90-day prior notice requirement set forth in Schedule 2 of the PJM OATT. We also establish a proceeding under section 206 of the FPA to determine whether NRG's reactive power rates remain just and reasonable. We further establish a refund effective date and hearing and settlement judge procedures.

12. The Commission has previously granted requests for waiver from a Regional Transmission Organization's tariff requirements in situations where: (1) the applicant is unable to comply with the tariff provision at issue in good faith; (2) the waiver is of limited scope; (3) the waiver addresses a concrete problem; and (4) the waiver does not have undesirable consequences, such as harming third parties.<sup>13</sup> We find that NRG and Seward's requested waiver satisfies these conditions.

13. First, we find that NRG and Seward have acted in good faith. NRG and Seward, by submitting the Informational Filing one day after executing the Asset Purchase Agreement, maximized the prior notice to the Commission and to the public of the transfer of the Facility. Second, we find that NRG and Seward's requested waiver is of limited scope. NRG and Seward are requesting a one-time waiver of the deadline required under Schedule 2. Third, we find that the waiver will remedy a concrete problem. Absent this waiver NRG and Seward will not be able to consummate the Transaction until 90 days after the submittal of the Informational Filing by NRG. Delaying the consummation of the transaction will be commercially disadvantageous to NRG and Seward. Finally, we find that granting NRG and Seward's request for waiver will not lead to undesirable consequences. The Reactive Power Tariff sets forth a revenue requirement for reactive supply and voltage control service that is specific to the Facility and it will be transferred to Seward along with the entire Facility. No resource is being transferred out of a fleet, and NRG will not continue to receive compensation for reactive supply and voltage support from the Facility.

14. We further find that NRG's revenue requirement for Reactive Service provided by the Facility and established in Docket No. ER04-1164-000<sup>14</sup> raises issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below. Accordingly,

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<sup>13</sup> *E.g., PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,033 (2014); *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,184, at P 13 (2011).

<sup>14</sup> Informational Filing at 2.

Docket No. ER04-1164-001, *et al.*

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we are instituting a proceeding under section 206 of the FPA in Docket No. EL16-28-000, into the justness and reasonableness of NRG's reactive power rates, and establish a refund effective date and hearing and settlement judge procedures. Although we are setting NRG's revenue requirement for Reactive Service for hearing in its entirety we note that use of Locational Marginal Price to calculate Heating Losses may result in over-recovery.<sup>15</sup>

15. In cases where, as here, the Commission institutes a section 206 investigation on its own motion, section 206(b) of the FPA requires that the Commission establish a refund effective date that is no earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than five months after the publication date.<sup>16</sup> In such cases, in order to give maximum protection to customers, and consistent with our precedent, we have historically tended to establish the section 206 refund effective date at the earliest date allowed by section 206, and we do so here as well.<sup>17</sup> That date is the date of publication of notice of initiation of the section 206 proceeding in Docket No. EL16-28-000 in the *Federal Register*.

16. Section 206(b) of the FPA also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of the section 206 proceeding, the Commission shall state the reason why it has failed to render such a decision and state its best estimate as to when it reasonably expects to make such a decision. As we are setting the section 206 proceeding in Docket No. EL16-28-000 for hearing and settlement judge procedures, we expect that, if the proceeding does not settle, we would be able to render a decision within eight months of the date of filing of briefs opposing exceptions to the Initial Decision. Thus, if the Presiding Judge were to issue an Initial Decision by December 31, 2016, we expect that, if the proceeding does not settle, we would be able to render a decision by October 31, 2017.

17. While we are setting these matters for a trial-type evidentiary hearing, we encourage the participants to make every effort to settle their dispute before hearing procedures commence. To aid the participants in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603

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<sup>15</sup> See Reliant Energy Seward, LLC, Attachment 1 (Testimony of John L. Simpson), Docket No. ER04-1164-000, at 18 (filed Aug. 31, 2004); *Dynegy Midwest Generation, Inc.*, 125 FERC ¶ 61,280, at P 35 (2008).

<sup>16</sup> 16 U.S.C. § 824e (b) (2012).

<sup>17</sup> See, e.g., *Idaho Power Co.*, 145 FERC ¶ 61,122 (2013); *Canal Electric Co.*, 46 FERC ¶ 61,153, *order on reh'g*, 47 FERC ¶ 61,275 (1989).

Docket No. ER04-1164-001, *et al.*

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of the Commission's Rules of Practice and Procedure.<sup>18</sup> If the participants desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise the Acting Chief Judge will select a judge for this purpose.<sup>19</sup> The settlement judge shall report to the Acting Chief Judge and the Commission within thirty days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Acting Chief Judge shall provide the participants with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) NRG's Informational Filing is hereby accepted as an informational filing only, as discussed in the body of this order.<sup>20</sup>

(B) NRG and Seward's request for waiver of the 90-day prior notice requirement set forth in Schedule 2 of the PJM OATT is hereby granted, as discussed in the body of this order.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), the Commission hereby institutes a proceeding in Docket No. EL16-28-000, concerning the justness and reasonableness of NRG's Reactive Power Tariff, as discussed in the body of this order. However, the hearing shall be held in

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<sup>18</sup> 18 C.F.R. § 385.603 (2015).

<sup>19</sup> If the participants decide to request a specific judge, they must make their joint request to the Acting Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

<sup>20</sup> This acceptance for filing shall not be construed as constituting approval of any service, rate, charge, classification, or any rule, regulation, contract, or practice affecting such rate or service contained in the Informational Filing; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such action is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against NRG.



Docket No. ER04-1164-001, *et al.*

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abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (D) and (E) below.

(D) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2015), the Acting Chief Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Acting Chief Judge designates the settlement judge. If the participants decide to request a specific judge, they must make their request to the Acting Chief Judge within five days of the date of this order.

(E) Within thirty days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Acting Chief Judge on the status of the settlement discussions. Based on this report, the Acting Chief Judge shall provide the participants with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty days thereafter, informing the Commission and the Acting Chief Judge of the participants' progress toward settlement.

(F) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Acting Chief Judge, shall, within fifteen days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(G) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of the proceeding under section 206 of the FPA in Docket No. EL16-28-000.



Docket No. ER04-1164-001, *et al.*

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(H) The refund effective date in Docket No. EL16-28-000 established pursuant to section 206 of the FPA shall be the date of publication in the *Federal Register* of the notice discussed in Ordering Paragraph (G) above.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

# Exhibit B



# Exhibit C

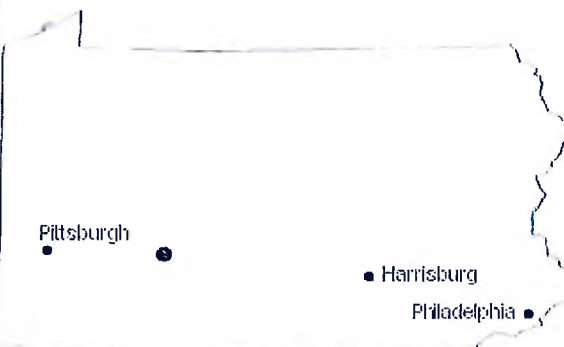


## Cambria Cogeneration Company

This 88 MW, base load, circulating fluidized bed (CFB) boiler plant is a Qualifying Facility that began commercial operations in March 1991. It has an agreement to supply power to Pennsylvania Electric Company until March 2011. The waste coal burned by the plant helps eliminate the source of acid water run-off from waste coal piles in the area and the ash produced by the plant is used beneficially to restore the landscape after removal of the waste coal.



<b>Location:</b>	Ebensburg, Pennsylvania
<b>Net Capacity:</b>	88 MW
<b>Equipment:</b>	2 - CFB Ahlstrom Boilers 1 - ABB VAX Steam Turbine
<b>Fuel:</b>	Waste Coal
<b>Power Purchasers:</b>	Pennsylvania Electric Company (FirstEnergy)
<b>Electrical Transmission:</b>	Pennsylvania Electric Company (FirstEnergy)
<b>NSG Interest:</b>	100%





155 FERC ¶ 61,021  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, Tony Clark,  
and Colette D. Honorable.

Cambria CoGen Company

Docket No. ER16-1100-000

ORDER GRANTING WAIVER

(Issued April 8, 2016)

1. On March 7, 2016, Cambria CoGen Company (Cambria) submitted, pursuant to Rule 207 of the Commission's Rules of Practice and Procedure,<sup>1</sup> a request for a limited, temporary waiver of the deadline to submit unit-specific Market Seller Offer Cap<sup>2</sup> (MSOC) data for the upcoming Base Residual Auction under the Reliability Pricing Model, pursuant to PJM Interconnection, L.L.C.'s (PJM) Open Access Transmission Tariff (Tariff), for the 2019/2020 delivery year.<sup>3</sup> As discussed below, we grant waiver as requested.

**I. Background**

2. PJM secures capacity commitments under the Reliability Pricing Model through a Base Residual Auction (BRA), held three years before a delivery year.<sup>4</sup> Attachment DD of the Tariff sets forth the terms and conditions governing the Reliability Pricing Model.

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<sup>1</sup> 18 C.F.R. § 385.207 (2015).

<sup>2</sup> The Market Seller Offer Cap is the maximum offer price applicable to certain Market Sellers under certain conditions, as determined in accordance with Section 6 of Attachment DD and Section II.E of Attachment M – Appendix of the Tariff. PJM, Intra-PJM Tariffs, OATT, Attachment DD.2, Definitions (24.0.0), § 2.41C.

<sup>3</sup> Capitalized terms used but not defined herein are intended to have the meaning given to such terms in the Tariff.

<sup>4</sup> A delivery year is a twelve-month period beginning on June 1 and ending on May 31.

Docket No. ER16-1100-000

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Pursuant to Section 6.4(b) of Attachment DD of the Tariff, Existing Generation Capacity Resources must provide data and documentation establishing the level of the MSOC applicable to the resource no later than one hundred twenty (120) days prior to the commencement of the offer period for the applicable auction.<sup>5</sup>

3. Cambria owns and operates an 88 MW waste coal-fired qualifying small power production facility that is located within PJM's Pennsylvania Electric Company (PENELEC) zone.

4. Cambria explains that potential participants in the BRA for the 2019/2020 delivery year were required to submit unit-specific MSOC data to PJM and PJM's Market Monitoring Unit (MMU) no later than January 12, 2016.<sup>6</sup> On February 9, 2016, PJM circulated revised default PENELEC zone MSOC values for the 2019/2020 delivery year that used a corrected Balancing Ratio. PJM's revised values were 4.7 percent lower than those previously posted.<sup>7</sup> Cambria states that, in light of the revised values, it determined that it must submit unit-specific MSOC data to facilitate its reasoned participation in the BRA.<sup>8</sup> Cambria explains that, in February 2016, it engaged in discussions with PJM staff about the default MSOC values for the PENELEC zone, and during the course of those discussions determined that the revised default MSOC values for the 2019/2020 delivery year will require Cambria to submit offers greater than the default MSOC in order to assure just and reasonable cost recovery.<sup>9</sup>

## **II. Waiver Request**

5. Cambria requests an extension of the deadline to submit its unit-specific MSOC data, from January 12, 2016, to March 11, 2016. Cambria further requests that the Commission issue an order as soon as possible.<sup>10</sup>

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<sup>5</sup> PJM, Intra-PJM Tariffs, OATT, Attachment DD.6, Market Power Mitigation (11.0.0), § 6.4; *see also id.* § 6.7 (describing the data submission).

<sup>6</sup> Filing at 2-3 (citing PJM, Intra-PJM Tariffs, OATT, Attachment DD.6, Market Power Mitigation (11.0.0), §§ 6.7–6.8).

<sup>7</sup> Filing at 3.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 1.



6. Cambria states that good cause exists to grant the requested waiver because (i) the underlying circumstances and decisions giving rise to the waiver request were made in good faith, (ii) the waiver is limited in scope, (iii) a concrete problem needs to be remedied, and (iv) the waiver will not have undesirable consequences.<sup>11</sup> Cambria asserts that it filed its waiver request as promptly as circumstances warranted and after consultation with PJM.<sup>12</sup> Cambria explains that it seeks only limited waiver of the data-submission deadline and is not seeking waiver of the requirement to provide sufficient documentation to support a unit-specific cost justification. Cambria asserts that the requested waiver will not have undesirable consequences, explaining that sell offers for the upcoming 2019/2020 BRA are not due until May 11, 2016; the waiver request only relates to data for the Cambria facility; and the waiver request will not adversely affect the ability of the PJM or the MMU to administer the upcoming BRA.<sup>13</sup>

### III. Notice of Filing and Responsive Pleadings

7. Notice of Cambria's filing was published in the *Federal Register*, 81 Fed. Reg. 13,783 (2016), with interventions and protests due on or before March 21, 2016. None was filed.

### IV. Commission Determination

8. The Commission has previously granted requests for waiver of a tariff requirement where: (1) the applicant is unable to comply with the tariff provision at issue in good faith; (2) the waiver is of limited scope; (3) the waiver addresses a concrete problem; and (4) the waiver does not have undesirable consequences, such as harming third parties.<sup>14</sup>

9. We find that Cambria's waiver request satisfies the criteria the Commission has applied in granting waiver. We find that Cambria acted in good faith by filing the waiver request as soon as circumstances warranted in light of the revised MSOC values and after consultation with PJM. We also find that Cambria's requested waiver is limited in scope because Cambria requests a one-time waiver of the submission deadline for its unit-

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 4.

<sup>13</sup> *Id.*

<sup>14</sup> *E.g., Reliant Energy Seward, LLC*, 154 FERC ¶ 61,017, at P 12 (2016); *Robinson Power Co., LLC*, 150 FERC ¶ 61,123, at P 11 (2015).

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specific MSOC data. In addition, we find that the requested waiver addresses a concrete problem because it will allow Cambria to submit unit-specific MSOC data in light of PJM's revised MSOC values for the upcoming BRA. Finally, we find that granting the requested waiver will not lead to undesirable consequences because it will not adversely affect the ability of PJM and the MMU to administer the BRA for the 2019/2020 delivery year; moreover, no parties opposed the request.

10. Accordingly, we grant Cambria's request for a limited, temporary extension of the deadline to submit its unit-specific MSOC data.

The Commission orders:

Cambria's request for a limited, temporary waiver is hereby granted, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

# Exhibit D



**Purchase Order to Master Service Agreement between  
PBS Coals, Inc. and Ridge Energy Company, Inc. dated August \_\_, 2011**

**PURCHASE ORDER NUMBER:**

**DATE:**

**PURPOSE:** Filter Cake Processing and Sale ("Services")

**WORK SITE:** Owner's Job 10 site ("Site") and Owner's Cambria Preparation Plant ("Plant"), both located in Somerset County, PA

**SCOPE OF WORK:** Contractor shall perform the Services to Owner as follows:

1. Provide a loader and a loader operator at the Plant
2. Load filter cake produced by the Plant as necessary and required
3. Transport filter cake from the Plant to the Site
4. Spread and dry filter cake on the Site
5. Load dried filter cake from Site into Owner's trucks
6. Load coarse material from Site into Owner's trucks

**PRICE AND PAYMENT:** Within 10 days after receipt of truck weight slips from Owner, Contractor shall pay Owner \$.50 per ton for all dried filter cake and coarse material loaded by Contractor into Owner's trucks. Weights shall be determined by \_\_\_\_\_.

If any terms and conditions in the Master Service Agreement conflict with the terms and conditions of this Purchase Order, the terms of this Purchase Order shall govern.

**THIS PURCHASE ORDER MAY ONLY BE MODIFIED  
BY WRITTEN AGREEMENT BETWEEN THE PARTIES**

- 1) 2 pd in Monthly Report
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- 3) Attach Tickets to Monthly Reports
- 4) pay 10 days after deliv pad

## MASTER SERVICE AGREEMENT

This **MASTER SERVICE AGREEMENT** ("Agreement") by and between **PBS COALS, INC.**, with an address at 1576 Stoystown Road, Friedens, PA 15541 (collectively "Owner") and **RIDGE ENERGY COMPANY, INC.**, with an address at 265 Swamp Road Clymer, PA 15728 ("Contractor"), is entered into as of the \_\_\_\_ day of August, 2011 ("Effective Date"), pursuant to the terms and conditions stated herein.

### Recitals

**WHEREAS**, Owner desire to purchase from Contractor, on a non-exclusive basis, the services, including the equipment or materials in connection with such services as described in Exhibit A ("Services").

### Agreement

**NOW, THEREFORE**, in consideration of the foregoing, the agreements, covenants and payments hereinafter set forth and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Purchase and Sale. From time to time during the term of this Agreement, Owner agrees to purchase from Contractor, on a non-exclusive basis, the Services, and Contractor agrees to provide the Services, in accordance with the terms and conditions set forth in this Agreement. Contractor will perform the Services as requested and approved by Owner pursuant to a purchase order issued by Owner hereunder ("Purchase Orders") and in accordance with the delivery dates set forth therein. Owner does not guarantee any minimum purchase amount under this Agreement.
2. Delivery Date/Location. Delivered and completed in accordance with the Schedule of Work set forth in the Purchase Orders ("Site"). Any materials or equipment shipped directly to Owner as part of the Services shall be delivered to the Site FOB destination, freight prepaid. Freight costs are included in the price. Time is of the essence in the performance of this Agreement.
3. Price and Payment. Prices for all Services are on a time and material basis based on the rates and prices set forth in Exhibit C.
4. Invoicing. Contractor shall submit invoices for Work performed to the attention of **Accounts Payable, P. O. Box 260, Friedens, PA 15541**. Contractor shall also send a copy of the invoice and supporting detail to the **Purchasing Manager** at the Owner's address listed in the first paragraph above. All invoices submitted for payment must contain, at a minimum, the following information:
  - (a) A valid purchase order number. Only one purchase order number is permitted per invoice;

(b) Contractor's full name, complete mailing address, contact name, and phone number;

(c) Contractor's remittance address if different than Contractor's mailing address;

(d) A unique invoice number;

(e) Invoice date, invoice due date, terms of payment and early payment discount percentage and amount (if offered), and payment due date to qualify for the discount;

(f) Quantity, description, unit price, extended price, all applicable tax and freight, and total invoice amount;

(g) Supporting documentation acceptable to Owner supporting the invoiced amount, which may include, without limitation, cost records, field records and materials-receiving reports signed by Owner's authorized representative, etc.

Owner shall not be obligated to pay any invoice which does not identify and describe the Work covered, and which is not accompanied by all supporting detail required by Owner.

5. Term. The term of this Agreement shall be for a period three months commencing on the Effective Date, unless terminated earlier in accordance with this Agreement. ~~(PBS, at its sole option)~~ may extend this Agreement for up to an additional three year term upon written notice to Contractor.

6. Agreement. The following attachments, exhibits and schedules are attached hereto and incorporated herein and made a part of this Agreement:

(a) General Conditions

(b) Insurance Requirements marked as Exhibit A

(c) Certificate of Compliance with Health and Safety Laws and Regulation marked as Exhibit B

These documents shall have precedence as follows: Face Sheet, General Conditions, Exhibits, specifications and drawings, schedules. *This Agreement shall not be valid, and no payments will be made by OWNER pursuant hereto, until Contractor has furnished the insurance certificate required by the General Conditions.*

8. General. Contractor shall not assign, transfer or subcontract this Agreement without the prior written consent of Owner, which consent shall not be unreasonably withheld. This Agreement shall not be amended, altered or modified except by a single instrument signed by representatives of Contractor and Owner, which instrument must expressly state that it undertakes to amend, alter or modify this Agreement. Except as

set forth herein, this Agreement is the entire agreement between the parties about the goods and/or services described herein and there are no other written or oral agreements that cover the subject matter of this Agreement. No waiver of any default by either party shall act as a waiver of a subsequent or different default. Section headings are for convenience only and shall have no legal or interpretive effect. In interpreting this Agreement, no presumption or inference shall be deemed to arise for or against either party due to the preparation of this document. This Agreement shall be governed by the laws of the state in which the goods will be delivered and/or the services will be performed and, to the extent relating to goods sold hereunder, by the Uniform Commercial Code applicable thereunder. Any provision of this Agreement found to be prohibited by law shall be ineffective to the extent of such prohibition without invalidating the rest of this Agreement.

**IN WITNESS WHEREOF**, the parties hereby cause this Agreement to be executed in duplicate by their duly authorized representatives as of the Effective Date.

**PBS COALS, INC.**

**RIDGE ENERGY COMPAY, INC.**

("Owner")

("Contractor")

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_



## GENERAL CONDITIONS

1. **Representations.** Contractor represents that it is experienced in Services of this type, is aware of all details involved in the Services, and is ready, willing and able to perform the Services.

2. **Performance.** Contractor shall perform the Services promptly, diligently, and in a safe and workmanlike manner and shall comply with Owner's timing and coordination of the Services. Without in any way limiting the responsibilities, duties and liabilities of Contractor provided for herein, Contractor shall, at a minimum, comply with Owner's safety standards and rules. Except as otherwise specified, Contractor shall provide and pay for all materials, supplies, labor, equipment, tools, water, power, and other items necessary to complete the Services and all materials shall be new. The time of performance is of the essence to this Agreement.

Contractor shall be responsible for adequately protecting the Services, any adjacent property and the public from injury or damage due to its action or neglect. Contractor shall have the risk of loss of all work in progress before acceptance and shall insure this responsibility. Contractor shall keep the worksite free from accumulation of waste material and debris and at completion of the Services shall remove all debris, implements and surplus materials from the worksite. Contractor represents that it has visited the worksite, familiarized itself with local conditions, and correlated its observations with the requirements of this Agreement.

3. **Warranty.** Contractor warrants that all workers or subcontractors shall be skilled in their trades, and where required, licensed and certified to provide the Services. The Contractor will supervise and direct the Services using its best skill and attention and shall be solely responsible for all means, methods, techniques, sequences and procedures in the performance and completion of the Services.

Contractor agrees to promptly correct any deficiencies or defects in the Services which are reported to Contractor by Owner or any governmental authority. If Contractor fails to correct or commence the correction of any deficiencies in the Services supplied within 5 days after notice from Owner, Owner may correct the deficiencies at Contractor's sole cost and expense. The foregoing warranty shall not limit or restrict any additional or greater rights Owner may have under other warranties, including those from vendors or subcontractors, nor shall it be deemed waived by receipt of, acceptance of or payment for the Services.

4. **Payment.** Contractor shall pay Owner pursuant to the terms set forth in the Purchase Order.

5. **Inspection, Audit.** Owner shall have the right at all times to inspect and observe the Services. Owner's representatives shall have access, at all reasonable times, to all of Contractor's books, records and documents of any kind which are in any way related to this Agreement for the purpose of auditing and verifying Contractor's performance of and compliance with the provisions of this Agreement. Contractor shall preserve all such records for six years after the final payment under this Agreement and Owner shall have the right to audit until the end of this period. If Owner's audit establishes that Contractor has paid Owner any sums which were improper or less than any balance due, Contractor shall pay such amounts immediately upon demand.

6. **Assignments and Subcontracts.** Contractor shall not assign or transfer any of its rights or obligations under this Agreement or subcontract any of the Services without Owner's prior written approval. Such approval, if any is granted, shall in no way lessen the responsibility of Contractor to perform in accordance with this Agreement and shall in no way create any relationship, contractual or otherwise, between Owner and any subcontractor.

7. **Independent Contractor.** Contractor is an independent contractor of Owner, and nothing herein contained or implied will at any time be so construed as to create the relationship of employer and employee, partnership, principal and agent, or joint venture as between Contractor and Owner. Contractor, solely and exclusively, shall employ, direct, supervise, discharge and fix the compensation and

working conditions and practices of its employees, shall be solely responsible for their payment and shall comply with all laws pertaining to employees. Contractor, solely and exclusively, shall be responsible for, and shall exercise complete control of its employees in all matters, disputes or grievances arising out of or in any way connected with Contractor's operations, including, without limitation, those involving safety matters. Contractor, solely and exclusively, shall be responsible for, and, at its sole cost and expense, shall pay for and maintain, all private and group employee benefits, plans and programs, including, without limitation, all life, accidental death and dismemberment, health, sickness, accident benefits, whether insured or not, which Contractor may offer to its employees; and with regard thereto shall indemnify and save harmless Owner from any and all claims and liability. Contractor shall maintain insurance for, or otherwise guarantee, the payment of federal black lung benefits to its employees in accordance with the Black Lung Benefits Reform Act of 1977 and other applicable laws and regulations.

8. **Changes.** Owner may make changes to the Services, including, without limitation, to the scope of performance; provided, however, to the extent such change would materially affect the price, the parties shall agree to an equitable adjustment in the price to reflect the change. Contractor shall not suspend performance of the Agreement while Owner is in the process of making such changes and any related adjustments, unless directed to do so by Owner. Contractor agrees that it will not make any process changes which might affect the performance, characteristics, reliability of the Services without prior written approval of Owner.

9. **Indemnity.** Contractor will indemnify and hold harmless Owner, its affiliates, subsidiaries and related companies, and their officers, directors, agents, representatives and employees, and each of their respective successors and assigns ("**Indemnified Parties**") against any and all suits, losses, damages, liabilities, costs and expenses (including reasonable attorneys' fees and other costs of defending any action) ("**Losses**") which such parties may sustain or incur (i) in connection with a breach of any representation, warranty or undertaking made by Contractor in this Agreement, or (ii) in connection with the performance, sale, use, or delivery of the Services (as applicable), whether the claim be based upon a theory of breach of contract or warranty, negligence, strict liability, other tort, infringement or any other legal theory, except to the extent caused by the negligence of the Owner or other Indemnified Party, or (iii) as a result of any suit, claim or demand under any environmental, transportation, health, safety or other laws, rules, regulations or requirements caused by or resulting from the Services or any acts or omissions of Contractor in the performance of this Agreement. Because Contractor's performance requires Contractor, its employees, agents or representatives to perform Services on the property of Owner or its agents, Contractor shall indemnify and hold harmless the Indemnified Party against all Losses for injury or damage to person or property arising out of such performance, except to the extent caused by the Owner or its agent. Contractor agrees that it will, when requested and given reasonable notice of the pendency of any such suits, claims or demands, assume the defense of the Indemnified Party against any such suits, claims or demands. Additionally, Contractor expressly and specifically waives all immunity that may be afforded to Contractor under the workers' compensation laws of any state or jurisdiction to the extent permitted by law.

10. **Insurance.** Contractor will obtain and continue in force, at its own expense, insurance coverage as set forth in Exhibit A. The insurance coverage shall survive the termination or expiration of this Agreement.

11. **Entry on Owner Lands, Hazardous Conditions.** The parties acknowledge that performance of the Services requires Contractor's entry upon Owner's premises, and Contractor is hereby given a right of entry for the performance of the Services. However, Owner advises and Contractor acknowledges that such lands may contain rough, uneven and unstable terrain and both natural and artificial conditions and activities involving risk of harm, and that active mining, construction, other operations may be conducted on or in vicinity of such lands. Owner has not inspected such lands and operations for the purposes of this Agreement and has not taken any efforts to discover or make safe dangerous conditions or activities for purposes of Contractor's performance of the Services. Owner makes no representation regarding the condition of such lands, except that they may contain natural and artificial hazards. As a material consideration for this Agreement, Contractor, for itself and employees and agents, assumes the risk of dangers connected with the lands and these operations and the responsibility for inspecting the premises for unsafe conditions, taking the necessary safety precautions for protection of Contractor and Contractor's

employees and agents, assuring a safe place for performance of the Services, and releases Owner from that responsibility and its negligence in connection therewith.

Nothing in this Agreement shall be construed to require Contractor to perform the Services under conditions which in Contractor's sole judgment present undue risks of harm. If in Contractor's judgment the Services should not proceed due to the presence of unsafe conditions, the correction or which may require changes or alterations in Owner's operations or property, Contractor shall suspend Services until Contractor and Owner agree on the corrections or alterations necessary for the safe performance of the contract Services.

**12. Owner Equipment and Materials.** IF OWNER FURNISHES CONTRACTOR ANY EQUIPMENT OR MATERIALS IN CONNECTION WITH THE SERVICES, SUCH EQUIPMENT AND MATERIALS SHALL BE FURNISHED "AS IS" AND WITHOUT ANY WARRANTY, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. Contractor shall have the duty to inspect any such equipment or material and the right to reject any such equipment or materials which are not safe or fit for use in the Services. If Owner is to prepare or condition the premises for Contractor's performance of the Services, such preparation or conditioning shall be done without any warranty of its fitness or suitability for Contractor's purposes, and Contractor shall have the duty to inspect the premises and the right to require additional preparation or conditioning if the premises are not safe or fit for performance of the Services.

**13. Secondary Brakes; Gross Vehicle Weight.** Any vehicle driven by an employee, agent or subcontractor of Contractor onto Owner's premises shall be equipped with a secondary brake retarding system that will provide the operator of the vehicle an additional method of slowing the vehicle in the event the vehicle's primary braking system malfunctions. Examples of acceptable secondary retarding systems include, but are not limited to, drive shaft brakes, exhaust brakes, "Jake" brakes, manual transmissions (low gear), automatic transmissions (low gear – provided that they are not equipped to shift into a higher gear at a high engine RPM), converter retarders and ground engagement implements. All vehicles driven by an employee, agent or subcontractor of Contractor that enter onto Owner's premises shall not exceed the gross vehicle weight rating specified by the original manufacturer of that vehicle. Owner shall have the right, but no obligation or duty, to inspect the vehicles for compliance hereunder. Owner shall have the right to prohibit any vehicle from entering onto its premises if that vehicle is not properly equipped with a secondary brake retarding system or it exceeds its manufacturer's gross vehicle weight rating. Any vehicle driven on the premises shall observe all posted speed limits and traffic control signs or devices. The failure of any agent, employee or subcontractor of Contractor to comply with the foregoing may result in the driver being banned from Owner's premises.

**14. Compliance with Laws.** Contractor agrees to comply with all applicable federal, state, tribal, and local laws, ordinances, regulations and standards (collectively, "Laws"). Contractor warrants that all Services performed or goods supplied shall comply with all applicable Laws. Contractor agrees that this includes, without limitation, the Federal Mine Safety and Health Act of 1977, as amended; the Surface Mining Control and Reclamation Act of 1977, applicable building codes; and all training, safety, environmental, transportation and labor laws and regulations. Contractor shall comply with all state, federal, tribal, and local permits, licenses or authorizations necessary or incidental to the performance of this Agreement. Contractor is hereby notified that prior to performing any Services at a coal mine, Contractor must acquire the Mine Safety and Health Administration training for persons performing Services or providing Services at a coal mine for its employees. Contractor agrees to sign an acknowledgment of training certificate and to provide proof thereof. Contractor also agrees to provide Owner with a copy of the applicable Material Safety Data Sheet (MSDS) for all products supplied or used under this Agreement.

**15. Equal Employment Opportunity.** The non-discrimination clauses (paragraphs 1 through 7) contained in Section 202 of Executive Order 11246, as amended by Executive Order 11375, relative to equal employment opportunity for all persons without regard to race, color, religion, sex or national origin, and the implementing rules and regulations prescribed by the Secretary of Labor are incorporated herein. The regulation of Federal contractors by the Vietnam Era Veterans Readjustment Assistance Act of 1974 (38 USCA 2012) and the Rehabilitation Act Amendments of 1974 (29 USCA 793) and all implementing rules and

regulations applicable therewith are incorporated herein. All subcontracts and Purchase Orders of Contractor made pursuant to this Contract shall contain provisions necessary to carry out the requirements of this Section.

16. **Taxes.** Contractor shall be responsible for payment by itself and its subcontractors of all taxes, including but not limited to, income, sales and use taxes, franchise and personal property taxes, all employment taxes and contributions, and similar taxes or contributions imposed in connection with this Agreement. If requested, Contractor shall furnish Owner with a certificate or other evidence of compliance with this Section. Contractor shall defend and indemnify Owner and hold Owner harmless from all liability for such taxes and contributions and for interest and penalties for failure to pay them.

17. **Liens and Encumbrances; Set-Off.** Contractor shall keep all property of Owner and all products of the Services free and clear of any liens and encumbrances arising in any manner from Contractor's Services and activities and Services and activities of its subcontractors. Contractor hereby waives for itself and its subcontractors and suppliers all rights to any mechanics', materialmen's or other lien of any kind against Owner's property on account of labor, materials, fixtures, tools, machinery, equipment or any other thing furnished in connection with this Agreement. Upon request, Contractor shall deliver to Owner a complete release of all liens arising out of this Agreement, receipts evidencing payment in full of all labor and materials for which a lien could be filed, or a bond satisfactory to Owner indemnifying against any lien. Contractor will insert the terms of this provision in all purchase orders and subcontracts hereunder for benefit of Owner. Payment of any invoice shall not be due until Contractor complies with these requirements. Owner shall have the right of set off any amount owed by Owner to Contractor against any amount due or to become due to Owner from Contractor.

18. **Owner's Right to Terminate Agreement or Suspend the Services.** If Contractor fails to make timely performance or to perform any provision of this Agreement, Owner may without prejudice to any other remedy it may have, make good the deficiencies and charge Contractor for the cost or, at its option, may terminate this Agreement and take possession of all materials, tools and appliances and finish the Services by such means as it sees fit. Remedies hereunder are in addition to other legal and equitable remedies.

Additionally, Owner may, at any time (without penalty) and for any reason, including its own convenience, terminate this Agreement in whole or in part by giving Contractor written notice of such termination not less than five (5) days prior to the effective date of termination. In such event Contractor shall pay to Owner any amounts owed for Services performed until date of termination. Owner shall not be liable for any consequential damages or loss of anticipated profits.

Upon receipt of any notice of termination, Contractor shall promptly (1) discontinue all affected Services (unless the notice directs otherwise), and (2) promptly deliver to Owner all completed or partially completed materials as may have been accumulated by Contractor in performing this Agreement, whether completed or in process, and any and all equipment and or materials furnished by Owner during the term of the Agreement.

Owner shall have the authority to suspend the Services, in whole or in part, for such periods and for such reasons as it may deem necessary or desirable, including, without limitation: (a) conditions considered unfavorable for the scheduled prosecution of the Services; or (b) other conditions considered adverse to the best interests of Owner. Contractor shall suspend Services immediately upon such direction by OWNER and shall not resume the Services until so ordered in writing by Owner.

19. **Separate Agreements.** Owner may do other work or hire other contractors to perform work at the premises, and Contractor shall cooperate with Owner and other contractors. Contractor shall not interfere in any way with the operations of Owner.

20. **Completion.** Upon completion of the Services under this Agreement, Contractor shall remain liable to Owner in accordance with applicable Laws, this Agreement, and all warranties relating to the performance of any of the Services provided under this Agreement.



**21. Confidentiality; Non-Publicity.** Contractor shall not without Owner's prior written consent, publish or communicate to others, via news release, public announcement, denial or confirmation, the existence, subject matter or the terms and conditions of the Agreement. Contractor agrees that Contractor will keep confidential all information disclosed to Contractor by Owner or any of Owner's affiliates in connection with the Agreement and will disclose such information only to those of its employees as will be directly concerned with performance under the Agreement. Contractor agrees that it will not disclose such information to any other person or entity without the express, prior written consent of Owner. Contractor agrees that it will protect the confidentiality of Owner's information with the same degree of care with which it protects its own proprietary information, but with no less than reasonable care, and will return all copies (in any medium recorded) of such information to Owner immediately upon written request. The parties agree Owner's information shall be considered commercial secrets qualified for protection under applicable law. Notwithstanding the foregoing, Contractor may disclose Owner's information that must be disclosed to any government, any agency or department thereof, or any stock exchange to the extent required by law, provided Contractor shall immediately notify Owner of such requirement and the terms thereof prior to such disclosure so that Owner may seek an appropriate protective agreement or order prior to the disclosure. Contractor shall not, without the prior written consent of Owner, use or allow the use of, whether in writing or in oral form, Owner's name, trademarks, logos, publications, photographs of Owner's facilities or equipment, or Contractor's and Owner's business relationship in connection with marketing or business activity. Any violation of this provision shall be deemed a material breach of the Agreement. The obligations under this Section will survive termination of the Agreement and will remain binding on Contractor, its respective affiliates, successors and assigns forever.

**22. Background Checks; Drug Screening.** Contractor shall assign only competent personnel to perform and complete the service, shall maintain strict discipline and good order among those personnel and shall provide proper supervision and direction of their work. Contractor shall have adequately screened and checked references of Contractor's employees that Contractor desires to utilize for the services provided under this Agreement. Such screening shall include, but not be limited to the following: a criminal background check, drug testing and verification of Contractor's employees' credentials, work history and reference checks. If, at any time, Owner determines that the assigned personnel are not performing in accordance with Owner's reasonable expectation, then upon notification from Owner, Contractor shall meet with Owner for purposes of addressing and resolving the personnel concerns of Owner and, upon Owner's request, shall immediately reassign that person to other work (i.e. work not relating to the services to be provided pursuant to this Agreement) and replace that person with a competent person acceptable to Owner.

**23. Notice.** Each notice, consent, request, or other communication required or permitted under the Agreement must be in writing delivered personally or sent by certified mail (postage prepaid, return receipt requested), by facsimile (with electronic confirmation of receipt), or by a recognized international courier, and addressed to Owner or Contractor as provided below:

**OWNER:** PBS Coals, Inc.  
Attn: Vice President Engineering and General Counsel  
1576 Stoystown Road  
Friedens, PA 15541

**CONTRACTOR:** Ridge Energy Company, Inc.  
265 Swamp Road  
Clymer, PA 15728

Each notice, consent, request, or other communication is deemed to have been received by the party to whom it was addressed (1) when delivered if delivered personally; (2) on the third business day after the date of mailing if mailed by certified mail; (3) on the first business day after the facsimile transmission if delivered by facsimile; or (4) on the date officially recorded as delivered according to the record of delivery if delivered by courier. Each party may change its address for purposes of the Agreement by giving written notice to the other party in the manner set forth above.

24. **Severability.** Any provision of this Agreement found to be prohibited by law shall be ineffective to the extent of such prohibition without invalidating the rest of this Agreement.
25. **Waiver.** Any waiver by Owner of any provision or condition of this Agreement shall not be construed or deemed to be a waiver of any other provision or condition of this Agreement, nor a waiver of a subsequent breach of the same provision or condition, unless such waiver is expressed in writing and signed by Owner.
26. **Entire Agreement.** The Agreement, including these General Conditions, the Exhibits and any attachments constitute the final agreement of the parties and supersedes all prior understandings and agreements of the parties. Sections 2, 3, 5, 7, 9, 10, 11, 12, 14, 16, 17, 20, 21, 24, 26, 27 and 29 shall survive termination or expiration of this Agreement.
27. **Amendments.** This Agreement shall not be amended, altered, or modified other than by written instrument signed by corporate officers of the parties or by the methods provided in these General Conditions.
28. **Choice of Law.** This Agreement shall be governed by the laws of the Commonwealth of Pennsylvania.
29. **Venue.** The Court of Common Pleas of Somerset County, Pennsylvania, and the United States District Court for the Western District of Pennsylvania, Johnstown Division.
30. **Headings.** The Section headings contained herein are solely for convenience and shall not constitute a substantive part of the parties' agreement or expand or restrict the contents of the Section.
31. **Ambiguities.** In case of ambiguity, inaccuracy, or incompleteness, or in case of any discrepancy between the Services and the drawings and specifications, Owner may make interpretations and issue binding instructions relating to these documents, within the general scope, which will be binding upon both parties and shall be without compensation.

**EXHIBIT A – INSURANCE REQUIREMENTS**

**PBS COALS, INC. and ROXCOAL, INC.  
INSURANCE REQUIREMENT PACKAGE**  
(Provide copies of required proof of insurance behind this Exhibit A)



**PBS COALS, INC. and ROXCOAL, INC.****INSURANCE REQUIREMENTS FOR CONTRACTORS**

Licensees should submit this form to their insurance agent so that all information is included on the Certificate of Insurance. All coverage must be indicated on the Certificate of Insurance.

***SUMMARY OF REQUIREMENTS<sup>1</sup>***

<b><u>TYPE OF COVERAGE</u></b>	<b><u>MINIMUM LIMITS</u></b>
<ul style="list-style-type: none"> <li>Workers' Compensation and Occupational Disease Disability</li> </ul>	As required by the laws of the state where the work is being performed
<ul style="list-style-type: none"> <li>Employers' Liability</li> </ul>	\$1,000,000 each accident and Employees by Disease
<ul style="list-style-type: none"> <li>Comprehensive Auto Liability- Bodily Injury and Property Damage (including owned, hired, and non-owned)</li> </ul>	\$1,000,000 CSL each occurrence included
<ul style="list-style-type: none"> <li>Comprehensive General Liability and Property Damage Insurance               <ul style="list-style-type: none"> <li>(including Operations, Protective, Products/Completed Operations, Broad Form Property Damage and Contractual Liability coverages)</li> </ul> </li> </ul>	\$5,000,000 CSL each occurrence
<ul style="list-style-type: none"> <li><b>Additional Coverages</b> Additional coverages are required for designated contractors. Evidence of the coverage must be included on the certificate of insurance.</li> </ul>	

<b><u>TYPES OF CONTRACTS</u></b>	<b><u>ADDITIONAL TYPES OF COVERAGES</u></b>	<b><u>MINIMUM LIMITS</u></b>
<ul style="list-style-type: none"> <li>Architects &amp; Engineers</li> </ul>	Professional Liability	\$2,500,000

<sup>1</sup> All insurers must have a minimum financial rating from the A.M. Best Company of B+ - VI.

**CERTIFICATE OF INSURANCE**

Proof of the coverage set forth on the preceding page must be provided to PBS Coals, Inc. via a Certificate of Insurance. The Certificate shall be signed by the authorized representative of the insurance company. The Certificate of Insurance shall include the following conditions:

- The Certificate Holder shall be: PBS Coals, Inc., its subsidiaries, affiliates and related companies.
- The Certificate shall contain a provision that the policy shall not lapse or be cancelled or materially changed without 30 days' prior written notice to the Certificate Holder.
- Indicate that the Certificate Holder, its parents and/or members, its subsidiaries, affiliates and related companies has been included as an additional insured under the policies (excluding workers' compensation and employers' liability).
- Indicate in the comments section of the Certificate of Insurance that contractual liability coverage exists.
- The Certificate must identify states where coverage applies.
- The insurer or its agent, upon written request, will provide a copy of policies referenced in the Certificate and will provide evidence of additional coverage as required by PBS Coals, Inc.

Questions:

You may address questions to:

PBS Coals, Inc.  
its subsidiaries, affiliates,  
and related companies  
1576 Stoystown Road  
Friedens, PA 15541  
Telephone: (814) 443-4668  
Fax: (814) 443-1224

(SEE ATTACHED EXAMPLE OF PBS COAL INC.'S MINIMUM INSURANCE REQUIREMENTS)

Certificate of Insurance**General Liability**

☒ Occur  
☒ Contract Liability  
☒ XCU  
☒ Additional Insured

Each Occurrence: \$5,000,000  
 Personal Adv Injury: Included  
 Products – Comp/Op Aggregate: Included

Certificate Holder must be named as additional insured.

**Auto Liability**

☒ Non-owned Autos  
☒ Hired Autos  
☒ All Owned Autos

Combined Single Limit: \$1,000,000

Certificate Holder must be named as additional insured.

**Workers Compensation**

☒ Waiver of Subrogation  
☒ Statutory Limit

**Employers Liability**

Each Accident: \$ 1,000,000  
 Disease Each Employee: \$ 1,000,000  
☒ Waiver of Subrogation

Waiver of subrogation in favor of Certificate Holder.

If coverage is obtained through the state fund, a current copy of the Certificate must be provided.

**Minimum AM Best Rating for Insurers**

Alpha Rating: B+  
 Financial Category: VI

**Additional Requirement(s)**

Certificate Holder must read: PBS Coals, Inc., its parents and/or members, subsidiaries, affiliates and related companies.

Certificate must evidence that contractual liability coverage exists.

The Certificate must identify states where coverage applies.

**Cancellation Clause**

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL (30) DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.

**EXHIBIT B****CERTIFICATE OF COMPLIANCE WITH HEALTH AND SAFETY LAWS AND REGULATIONS**

The undersigned Contractor certifies to PBS Coals Inc. ("Owner") that Contractor and its employees are familiar with and understand the requirements of all applicable federal and state laws and regulations, including without limitation the regulations of the Federal Mine Safety and Health Administration ("MSHA") and the Federal Occupational Safety and Health Administration ("OSHA"), whichever has jurisdiction over the work to be performed, and the Contractor will be fully responsible for performance of such work in compliance with all such legal requirements. Contractor certifies to Owner that Contractor is familiar with and understands the requirements of the Black Lung Benefits Reform Act and regulations. Contractor also certifies to Owner that all employees entering onto Owner's property will have all the required Federal and State mandated training necessary to perform the work or a letter from MSHA and/or the state agency stating why such training is not required.

Contractor further assures Owner that it has been assigned the MSHA identification number appearing below. If a MSHA I.D. number is not required by MSHA policy, please state reason why it is not required in the space provided below.

MSHA I.D. NUMBER \_\_\_\_\_

**CONTRACTOR**

**RIDGE ENERGY COMPANY, INC.**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

EXHIBIT C

SAMPLE PURCHASE ORDER

Purchase Order to Master Service Agreement between  
PBS Coals, Inc. and Ridge Energy Company, Inc. dated \_\_\_\_\_

PURCHASE ORDER NUMBER:

DATE:

PURPOSE:

WORK SITE:

SCOPE OF WORK:

PRICE AND PAYMENT:

If any terms and conditions in the Master Service Agreement conflict with the terms and conditions of this Purchase Order, the terms of this Purchase Order shall govern.

THIS PURCHASE ORDER MAY ONLY BE MODIFIED  
BY WRITTEN AGREEMENT BETWEEN THE PARTIES

# EXHIBIT E

## United States Department of the Interior



OFFICE OF SURFACE MINING  
RECLAMATION AND ENFORCEMENT  
Division of Compliance Management



November 13, 2019

Christopher B. Power

Babst Calland Clements and Zomnir, P.C.

BB&T Square

300 Summers Street, Suite 1000

Charleston, WV 25301

cpower@babstcalland.com

Dear Mr. Power:

This is in response to your request for an administrative review of the audit of PBS Coals, Inc. (PBS Coals) Audit Report Number 20160241067, dated March 9, 2017. The audit found PBS Coals had underreported 1,671,365.01 tons and overreported 325.69 tons of coal, for a net 1,671,039.32 underreported tons.

PBS Coals claims the underreported tonnage presented in the audit report should not be subject to the reclamation fee. After a review of all submitted documentation, I have determined the underreported tonnage does not qualify under OSMRE's No Value policy and is subject to the reclamation fee. Specifically, the arguments presented in PBS Coals' request for an administrative review and my response follows:

1. The material and the process that produced it should not have been subject to payment of Abandoned Mine Land Reclamation Fees because it did not constitute "coal produced for sale, transfer or use" within the meaning of 30 CFR 870.12(a).

Under the provisions of Federal regulations (30 CFR 870.5), reclamation fees apply to remined coal. The regulations specifically state, "reclaimed coal means coal recovered from a deposit that is not in its original geological location, such as refuse piles or culm banks or retaining dams and ponds that are or have been used



during the mining or preparation process, and stream coal deposits. Reclaimed coal operations are considered to be surface coal mining operations for fee liability and calculation purposes”.

2. The assessed material and the process that produced it should have been determined to be exempt from payment of AML Fees based on a “No Value Determination”.

OSMRE has a policy on the imposition of reclamation fees on coal removed from an abandoned coal refuse pile. The regulations at 30 CFR 701.5 define a “*refuse pile*” as “a surface deposit of coal mine waste that does not impound water, slurry, or other liquid or semi-liquid material”. OSMRE’s policy on the applicability of reclamation fees to coal removed from an abandoned coal refuse pile provides, under very specific circumstances, that material removed from refuse piles can be considered to have “no value” for reclamation fee purposes. For the material to be considered to have no value under this policy, the operator must request a No Value Determination and submit information to document the material is from a permitted coal refuse pile and meets all four of the following criteria:

- The material was, or is, the waste by-product of a coal preparation process.
- The waste material is used in a small power production or cogeneration facility qualified by the Federal Energy Regulatory Commission (FERC) to burn waste material. In order to grant certification, the Commission must find that the refuse material is a by-product and has little or no value.
- Except for use in the waste-coal fired small power production or cogeneration facility, there exists no relevant market for the waste material.
- The material is not reprocessed utilizing gravity separation (wet washing) to remove the residual coal from the refuse.

These criteria represent the minimum standards that must be met, and other factors may be considered in reaching a final decision.

The OSMRE Payer Handbook clearly states that any tons sold or transferred prior to receiving an approved No Value Determination must be reported and fees paid at the surface or ad valorem rate. Additionally, in a letter dated February 20, 2014, PBS Coals was notified of the process and documentation needed to request a No Value Determination for a permitted operation. PBS Coals did not have an approved No Value Determination during the audit period. Requests for No Value Determinations made subsequent to the audit period on July 25, 2016, for PA permit numbers 56841603 and 56900701, were denied (March 30, 2017).

3. The Assessed Material was removed from a coal refuse disposal area.

As previously stated, the regulations (30 CFR 870.5) define coal recovered from a deposit that is not in its original geological location, such as refuse piles that are or have been used during the mining or preparation process are reclaimed coal subject to reclamation fees at the surface fee rate.

4. The Assessed Material is a waste by-product of the coal preparation process, was transported for use in a small power productions or co-generation facility qualified by FERC, has no other relevant market, and was not reprocessed utilizing gravity separation.

These arguments are referring to the criteria for a No Value Determination. PBS Coals did not have an approved No Value Determination during the period covered by the audit (April 1, 2013 through December 31, 2015) nor had they made a request for a No Value Determination. Prior to receiving an approved No Value Determination, tons must be reported and fees paid at the surface or ad valorem rate.

After careful consideration of all available information, I have determined the tonnage subject to reclamation fees, per the audit, is correct. However, the permit allocation of the tonnage was revised to agree with the "Filter cake/Refuse Removal Summary" schedule provided for the administrative review. The revised audit report is attached.

This completes the administrative review. If you have any questions, please contact me at 615-306-1757 or via email at [amarco@osmre.gov](mailto:amarco@osmre.gov).

Sincerely,

*A Marco*

Alison Marco

Audit Appeals Officer

Attachments: Revised Audit Report No. 20169241067

# EXHIBIT F

REVISED REPORT NUMBER: 20169241067

OFFICE OF SURFACE MINING RECLAMATION & ENFORCEMENT

Division of Compliance Management

Revised Reclamation Fee Compliance Audit

of

PBS Coals, Inc.

for the Period

April 1, 2013 through December 31, 2015

Revised Report Issuance Date: November 13, 2019

REVISED REPORT NUMBER: 20169241067

Revised Reclamation Fee Compliance Audit  
of  
PBS Coals, Inc.  
for the Period  
April 1, 2013 through December 31, 2015

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PBS Coals, Inc.  
PO Box 260  
Friedens, PA 15541

## Independent Auditor's Report

### Revised Report on the OSM-1 Forms

We have audited the OSM-1 Forms required by the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. §§ 1201-1328, filed by PBS Coals, Inc. (PBS Coals) for the period April 1, 2013 through December, 31 2015. During the period under audit, PBS Coals reported 138,427.38 tons of coal. This revised report supersedes Report Number 20160241067 issued March 9, 2017. The Council for PBS Coals requested an administrative review of the original audit findings. This report reflects the revised audit results after an examination of additional information submitted by PBS Coals for the administrative review.

Under the provisions of SMCRA and its implementing Federal regulations (30 CFR, Part 870), coal mine operators are required to pay a reclamation fee on each ton of coal produced for sale, transfer, or use. The fee is determined by the gross weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator. Gross weight includes impurities that have not been removed prior to initial sale, transfer, or use, excluding excess moisture deductions as explained in 30 CFR 870.18. Initial sale, transfer, or use is determined by the first transaction or use of the coal by the operator immediately after it is severed. Beginning October 1, 2012 the fee is 28 cents per ton for surface mining operations, 12 cents per ton for underground and in situ mining operations, and 8 cents per ton for lignite coal. However, the fee may be computed using a percentage based on the sales value of the coal (ad valorem) when it results in a lower than standard rate. The ad valorem fee for surface and underground mined coal is 10 percent of the sales value of the coal, and for lignite coal is 2 percent of the sales value of the coal.

Operators must report tonnage and pay reclamation fees by filing a Coal Reclamation Fee Report (OSM-1 Form) with the Office of Surface Mining Reclamation and Enforcement (OSMRE) no later than 30 days after the end of each calendar quarter. All operators who receive an OSM-1 Form, including those with no reportable tonnage, must file a completed form. Furthermore, operators are required to maintain records to substantiate the accuracy of reported tonnage, and operators must make these records available for inspection by OSMRE Fee Compliance Auditors. The Secretary of the Interior holds permittees and operators jointly and severally responsible for reporting and paying reclamation fees. Agreements between private parties do not relieve the permittee or the operator of their responsibilities under SMCRA.



### ***Management's Responsibility***

Management is responsible for compliance with the reclamation fee provisions of SMCRA and its implementing Federal regulations; this includes the preparation and accurate filing of OSM-1 Forms. Management is also responsible for the internal controls necessary to enable the preparation and filing of OSM-1 Forms that are free from material misstatement, whether due to fraud or error.

### ***Auditor's Responsibility***

Our responsibility is to express an opinion on PBS Coal's compliance with the reclamation fee requirements based on our audit. SMCRA requires that we conduct audits to ensure full compliance with the provisions of the law. Our audit was conducted in accordance with auditing standards generally accepted in the United States of America and the standards applicable to financial audits contained in Government Auditing Standards, issued by the Comptroller General of the United States. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the OSM-1 Forms are free from material misstatement.

An audit includes examining, on a test basis, evidence about PBS Coal's compliance with the reclamation fee requirements and performing other procedures necessary in the circumstances. The procedures selected depend on the auditor's judgment, including the assessment of the risks of material misstatement, whether due to fraud or error. In making those risk assessments, the auditor considers internal controls relevant to the reclamation fee requirements, in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the entity's internal controls. Accordingly, we express no such opinion on PBS Coal's internal controls.

We believe that the audit evidence obtained is sufficient and appropriate to provide a reasonable basis for our opinion.

### ***Basis for Qualified Opinion***

#### **Failure to Report All Tons and Pay All Fees**

PBS Coals did not report and pay fees on each ton of coal produced for sale, transfer, or use, as required by Federal regulations (30 CFR 870.12). Specifically, PBS Coals underreported 1,671,039.32 tons of coal during the audit period as follows:

- ☐ Underreported 1,671,365.01 tons from "filter cake" coal refuse sales:
  - 1,644,095.40 tons underreported, subject to reduced Ad Valorem fee rates;
  - 2,480.63 tons underreported, subject to the standard Surface fee rate; and
  - 24,788.98 underreported, subject to the standard Underground fee rate;
- ☐ Overreported (325.69) tons of coal subject to the standard Surface fee rate due to bookkeeping errors.

### ***Qualified Opinion***

In our opinion, except for the 1,671,039.32 net tons underreported as described in the "Basis for Qualified Opinion", PBS Coals complied in all material respects, with the reclamation fee provisions of SMCRA, and its implementing Federal regulations during the audit period. Nothing additional came to our attention in connection with the audit that caused us to believe PBS Coals did not comply with the reclamation fee provisions of SMCRA and its implementing Federal regulations for transactions not tested.

Details of the reported tonnage and audit results are presented in Exhibits A through F.

### ***Recommendations***

We recommend OSMRE take the necessary action to collect the additional fees owed by PBS Coals on the underreported tonnage identified in this report, plus applicable interest and penalties.

We recommend PBS Coals report tonnage and pay reclamation fees on all tonnage produced and subsequently sold, transferred, or used as required by 30 CFR 870.12 and 870.15. Specifically, we recommend PBS Coals report all "filter cake" coal refuse tonnage sold, transferred, or used and pay reclamation fees at the applicable rates.

### ***Views of Responsible Officials***

The revised audit results were emailed to the Council for PBS on November 4, 2019.

### ***Restriction on Use***

This report may not be released to anyone outside of OSMRE without the approval of the Division of Compliance Management. Furthermore, the information contained in this report should not be used for purposes other than those intended without prior consultation with the Division of Compliance Management regarding its applicability.

*A Marco*

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Alison Marco, Audit Appeals Officer  
Office of Surface Mining Reclamation & Enforcement  
Division of Compliance Management

REVISED REPORT NUMBER: 20169241067

EXHIBIT A

PBS Coals, Inc.  
Summary of Audit Results  
April 1, 2013 through December 31, 2015

Permit Number	Reported Tonnage	Audited Tonnage	Under (Over) Reported Tonnage
PA/56060109/050161	0.00	0.00	0.00
PA/56070103/050161	0.00	0.00	0.00
PA/56070110/050161	64,090.68	64,090.68	0.00
PA/56080108/050161	0.00	0.00	0.00
PA/56080109/050161	0.00	0.00	0.00
PA/56090111/050161	0.00	0.00	0.00
PA/56090113/050161	0.00	0.00	0.00
PA/56100101/050161	51,064.39	50,738.70	(325.69)
PA/56100102/050161	17,141.15	17,141.15	0.00
PA/56100106/050161	180.81	180.81	0.00
PA/56101301/050161	0.00	0.00	0.00
PA/56120105/050161	0.00	0.00	0.00
PA/56120106/050161	0.00	0.00	0.00
PA/56120111/050161	0.00	0.00	0.00
PA/56120113/050161	5,950.35	5,950.35	0.00
PA/56841608/050161	0.00	27,269.61	27,269.61
PA/56900109/050161	0.00	0.00	0.00
PA/56900701/050161	0.00	1,171,909.38	1,171,909.38
PA/56910701/050161	0.00	472,186.02	472,186.02
PA/56950106/050161	0.00	0.00	0.00
Totals	138,427.38	1,809,466.70	1,671,039.32

REVISED REPORT NUMBER: 20169241067

EXHIBIT B

PBS Coals, Inc.  
 Surface Tonnage Reporting Discrepancies  
 Permit Number PA/56100101/050161  
 April 1, 2013 through December 31, 2015

Calendar Quarter Ending	Reported Tonnage	Audited Tonnage	Under (Over) Reported Tonnage
06/30/2014	2,458.00	2,132.31	(325.69)
Total			(325.69)

REVISED REPORT NUMBER: 20169241067

EXHIBIT C

PBS Coals, Inc.  
 Surface Tonnage Reporting Discrepancies  
 Permit Number PA/56841608/050161  
 April 1, 2013 through December 31, 2015

Calendar Quarter Ending	Reported Tonnage	Audited Tonnage	Under (Over) Reported Tonnage
06/30/2013	0.00	1,591.94	1,591.94
09/30/2013	0.00	21.60	21.60
03/31/2014	0.00	847.33	847.33
06/30/2014	0.00	19.75	19.75
Total			<u>2,480.62</u>

REVISED REPORT NUMBER: 20169241067

EXHIBIT D

PBS Coals, Inc.  
Underground Tonnage Reporting Discrepancies  
Permit Number PA/56841608/050161  
April 1, 2013 through December 31, 2015

Calendar Quarter Ending	Reported Tonnage	Audited Tonnage	Under (Over) Reported Tonnage
06/30/2013	0.00	10,096.34	10,096.34
09/30/2013	0.00	1,213.46	1,213.46
03/31/2014	0.00	11,592.16	11,592.16
06/30/2014	0.00	1,887.03	1,887.03
Total			24,788.99

REVISED REPORT NUMBER: 20169241067

EXHIBIT E

PBS Coals, Inc.  
 Ad Valorem Tonnage Reporting Discrepancies  
 Permit Number PA/56900701/050161  
 April 1, 2013 through December 31, 2015

Calendar Quarter Ending	Reported Tonnage	Audited Tonnage	Under (Over) Reported Tonnage
06/30/2013	0.00	101,733.72	101,733.72
09/30/2013	0.00	67,426.94	67,426.94
12/31/2013	0.00	41,255.00	41,255.00
03/31/2014	0.00	111,868.51	111,868.51
06/30/2014	0.00	142,826.22	142,826.22
09/30/2014	0.00	131,729.00	131,729.00
12/31/2014	0.00	140,252.65	140,252.65
03/31/2015	0.00	118,631.76	118,631.76
06/30/2015	0.00	104,441.00	104,441.00
09/30/2015	0.00	139,410.00	139,410.00
12/31/2015	0.00	72,334.58	72,334.58
Total			<u>1,171,909.38</u>



REVISED REPORT NUMBER: 20169241067

EXHIBIT F

PBS Coals, Inc.  
 Ad Valorem Tonnage Reporting Discrepancies  
 Permit Number PA/56910701/050161  
 April 1, 2013 through December 31, 2015

Calendar Quarter Ending	Reported Tonnage	Audited Tonnage	Under (Over) Reported Tonnage
06/30/2013	0.00	26,957.41	26,957.41
09/30/2013	0.00	64,793.29	64,793.29
12/31/2013	0.00	61,295.19	61,295.19
03/31/2014	0.00	44,299.91	44,299.91
06/30/2014	0.00	29,100.55	29,100.55
09/30/2014	0.00	52,735.74	52,735.74
12/31/2014	0.00	50,756.12	50,756.12
03/31/2015	0.00	42,846.73	42,846.73
06/30/2015	0.00	25,903.18	25,903.18
09/30/2015	0.00	39,950.50	39,950.50
12/31/2015	0.00	33,547.40	33,547.40
Total			<u>472,186.02</u>

## Small Business Regulatory Enforcement Fairness Act (SBREFA)

### Your Comments Are Important

The Small Business and Agriculture Regulatory Enforcement Ombudsman and 10 Regional Fairness Boards were established to receive comments from small businesses about Federal agency enforcement actions. The Ombudsman will annually evaluate the enforcement activities and rate each agency's responsiveness to small business. If you are a small business and wish to comment on the enforcement or compliance activities of OSMRE, call 1 888 REG FAIR (1 888 734 3247).

## UNITED STATES DISTRICT COURT

for the

Western District of Pennsylvania ☐

PBS COALS, INC.

*Plaintiff(s)*

v.

DAVID BERNHARDT, United States Secretary of the  
Interior, and  
LANNY E. ERDOS, Acting Director, U.S. Department  
of the Interior, Office of Surface Mining Reclamation  
and Enforcement

*Defendant(s)*

Civil Action No.

## SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

Lanny E. Erdos  
Acting Director  
Office of Surface Mining Reclamation and Enforcement  
U.S. Dept. of the Interior  
1849 C Street NW  
Washington, DC 20240

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Kevin J. Garber  
Babst Calland Clements and Zomnir, P.C.  
Two Gateway Center, 6th Floor  
603 Stanwix Street  
Pittsburgh, Pennsylvania 15222

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: \_\_\_\_\_

\_\_\_\_\_  
*Signature of Clerk or Deputy Clerk*

Civil Action No. \_\_\_\_\_

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* \_\_\_\_\_  
was received by me on *(date)* \_\_\_\_\_.

☐ I personally served the summons on the individual at *(place)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
\_\_\_\_\_, a person of suitable age and discretion who resides there,  
on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* \_\_\_\_\_, who is  
designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I returned the summons unexecuted because \_\_\_\_\_; or

☐ Other *(specify)*: \_\_\_\_\_

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*


\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12) Summons in a Civil Action

# UNITED STATES DISTRICT COURT

for the

Western District of Pennsylvania 

PBS COALS, INC.

*Plaintiff(s)*

v.

DAVID BERNHARDT, United States Secretary of the  
Interior, and

LANNY E. ERDOS, Acting Director, U.S. Department  
of the Interior, Office of Surface Mining Reclamation  
and Enforcement

*Defendant(s)*

Civil Action No.

## SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

The Honorable David Bernhardt  
Secretary of the Interior  
Department of the Interior  
1849 C Street, N.W.  
Washington DC 20240

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Kevin J. Garber  
Babst Calland Clements and Zomnir, P.C.  
Two Gateway Center, 6th Floor  
603 Stanwix Street  
Pittsburgh, Pennsylvania 15222

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: \_\_\_\_\_

\_\_\_\_\_  
*Signature of Clerk or Deputy Clerk*

Civil Action No. \_\_\_\_\_

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* \_\_\_\_\_  
was received by me on *(date)* \_\_\_\_\_.

☐ I personally served the summons on the individual at *(place)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
\_\_\_\_\_, a person of suitable age and discretion who resides there,  
on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* \_\_\_\_\_, who is  
designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I returned the summons unexecuted because \_\_\_\_\_; or

☐ Other *(specify)*: \_\_\_\_\_

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc: